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Leaving the House: The Constitutional Status of Resignation from the House of Representatives

Josh Chafetz

Cornell Law School, jc2284@cornell.edu

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LEAVING THE HOUSE: THE CONSTITUTIONAL STATUS OF RESIGNATION FROM THE HOUSE OF REPRESENTATIVES

JOSH CHAFETZ†

ABSTRACT

*Do members of the House of Representatives have a constitutional right to resign their seats? This Article uses that question as a window onto broader issues about the relationship between legislators and citizens and the respective roles of liberalism and republicanism in the American constitutional order. The Constitution explicitly provides for the resignation of senators, presidents, and vice presidents, but, curiously, it does not say anything about resigning from the House of Representatives. Should we allow the *expressio unius interpretive* canon to govern and conclude that the inclusion of some resignation provisions implies the impermissibility of resignation when there is no such clause? Or should we consider this a meaningless variation?*

This Article examines how members left (or were prevented from leaving) the House of Commons, the colonial American legislatures,

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† Assistant Professor of Law, Cornell Law School. Thanks to Akhil Amar, Will Baude, Rick Brooks, Aaron Bruhl, Henry Chafetz, Doug Curran, Erin Delaney, Eric Grant, Marin Levy, Jennifer Nou, Catherine Roach, Steve Sachs, Larry Solum, Michael Stern, Seth Tillman, Lindsey Worth, and Justin Zaremby, as well as faculty audiences at Harvard and Cornell Law Schools, for helpful and thought-provoking comments on earlier drafts. Any remaining errors or infelicities are, of course, my own.

the early state legislatures, and the Continental Congress and concludes that the background assumption at the Founding was that legislative seats could not be resigned. Moreover, the available evidence from the Constitution's drafting shows that the Founders understood there to be a difference between the House and Senate with regard to resignation. The Article presents several reasons, based on the different institutional designs and functions of the two houses, why this might have been the case, including different term lengths and methods of appointment and the early Senate's role as a quasi-ambassadorial body. From this historical evidence, the Article suggests that the House has the power to prevent its members from resigning.

However, the House of Representatives has never exercised this power. After surveying the debates over resignation in the early Congresses, the Article concludes by considering policy reasons for requiring members to get the House's permission to quit their seats. Specifically, the Article offers two paradigm cases for returning to the original understanding: the first case deals with members who wish to resign while they stand accused of ethical transgressions; the second case deals with members who wish to leave because legislative service has ceased to be convenient for them. The Article argues that both cases point toward the need for a return to a previous, more republican, understanding of resignations.

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INTRODUCTION

Does a member of the United States House of Representatives have a constitutional right to resign? The question is deceptively simple—we are, after all, accustomed to seeing members resign all the time.¹ But despite explicitly providing for the resignations of senators,² the president,³ and the vice president,⁴ the Constitution's text nowhere provides for the resignation of a member of the House of Representatives.⁵ A straightforward application of the *expressio*

1. There are a number of recent examples. See, e.g., John M. Broder, *Representative Quits, Pleading Guilty in Graft*, N.Y. TIMES, Nov. 29, 2005, at A1 (noting the resignation of Randy Cunningham); Monica Davey, *Lawmaker Guilty of Manslaughter; Says He'll Resign*, N.Y. TIMES, Dec. 9, 2003, at A1 (noting the resignation of Bill Janklow); Michael Grunwald, *DeLay Pulls No Punches in Final Speech to House*, WASH. POST, June 9, 2006, at A3 (noting the resignation of Tom DeLay); *National Briefing Washington: Congressman Resigns over Scandal*, N.Y. TIMES, Nov. 4, 2006, at A13 (noting the resignation of Bob Ney); Hans Nichols, *Ballance Resigns from Seat*, HILL (Wash., D.C.), June 9, 2004, at 3 (noting the resignation of Frank Ballance); Christi Parsons & Rick Pearson, *Hastert Farewell Urges Civility*, CHI. TRIB., Nov. 16, 2007, at C3 (noting the resignation of Dennis Hastert); Dave Wedge, *Meehan Move Leaves 'Power Vacuum' in State Delegation*, BOSTON HERALD, Mar. 14, 2007, at 6 (noting the resignation of Martin Meehan); Kate Zernike & Abby Goodnough, *Lawmaker Quits over E-mail Sent to Teenage Pages*, N.Y. TIMES, Sept. 30, 2006, at A1 (noting the resignation of Mark Foley).

2. U.S. CONST. art. I, § 3, cl. 2 (providing for the appointment of a replacement senator when "Vacancies happen by Resignation, or otherwise").

3. *Id.* art. II, § 1, cl. 6 ("In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President . . ."); *id.* amend. XXV, § 1 ("In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.").

4. *Id.* art. II, § 1, cl. 6 ("[T]he Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President . . .").

5. See *id.* art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.").

unius canon of interpretation,⁶ then, would seem to leave us at odds with everyday practice. Surprisingly, this fact has received almost no attention at all, either in the scholarly literature⁷ or in congressional

6. “*Expressio unius*” is short for “*expressio unius est exclusio alterius*”—the canon that holds that the expression of one thing suggests the exclusion of others. See WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 88–91 (2007) (describing the canon’s background and application); 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION 304–33 (6th ed. 2000) (same). So, for example, when a parent tells a child who is ogling a table full of desserts that the child may have one cookie and one brownie, it is understood to imply that the child may not also have two pieces of pie and a cupcake. Or, to take the question this Article considers, the inclusion of provisions for the resignation of some government officials can be read to imply that officials for whom no such provision exists may not resign.

7. Professor Currie, in his magisterial *Constitution in Congress* series, devotes less than a footnote to the issue of whether members of the House can resign. See DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 135 n.41 (1997) (suggesting merely that there is “no plausible reason for treating the two chambers differently in this regard”). Other scholars who study constitutional congressional procedure have given the issue of resignation even less attention. See, e.g., WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 189–227 (3d ed. 2001) (discussing constitutional requirements for serving in Congress, but not for leaving it); ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 465–593 (2d ed. 2002) (same); WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 935–57 (4th ed. 2005) (discussing ballot access but not resignation); Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623, 650 n.81 (1996) (noting in passing that the opportunity costs of running for political office are reduced because a successful candidate “can always resign to take advantage of [other] opportunities if they become sufficiently attractive”); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 386–437 (2004) (making no mention at all of the issue of resignation). Indeed, Lexis and Westlaw searches turn up a number of mentions of members who have resigned (or threatened to do so) but nothing about the constitutional issues raised by resignation.

There is a substantial political science literature on why members leave Congress and what they do next, but this literature, too, is wholly inattentive to the constitutional issues surrounding resignation from the House. Instead, it generally treats resignation as raising the same issues as retirement (that is, the decision not to run for another term)—it treats both as if they involve only issues of when and why members choose to leave the House. See, e.g., JOHN R. HIBBING, CHOOSING TO LEAVE: VOLUNTARY RETIREMENT FROM THE U.S. HOUSE OF REPRESENTATIVES *passim* (1982) (discussing retirement without mentioning resignation’s constitutionality); JOHN R. HIBBING, CONGRESSIONAL CAREERS: CONTOURS OF LIFE IN THE U.S. HOUSE OF REPRESENTATIVES 23–24 (1991) (providing detailed statistical analyses of the career paths of members of the House without ever discussing the constitutionality of resignation); DAVID R. MAYHEW, AMERICA’S CONGRESS: ACTIONS IN THE PUBLIC SPHERE, JAMES MADISON THROUGH NEWT GINGRICH 129–67 (2000) (discussing postcongressional political ambition without mentioning the constitutionality of resignation); Allan G. Bogue et al., *Members of the House of Representatives and the Processes of Modernization, 1789–1960*, in 1 THE CONGRESS OF THE UNITED STATES: PATTERNS OF RECRUITMENT, LEADERSHIP, AND INTERNAL STRUCTURE, 1789–1989, at 21, 40–42 (Joel H. Silbey ed., 1991) (combining resignation, acceptance of federal appointment, running for another office, and election to the Senate into a single category of “voluntary termination” for the purposes of analysis); Charles S.

procedure manuals.⁸ *Expressio unius* is by no means an ironclad rule,

Bullock, III, *House Careerists: Changing Patterns of Longevity and Attrition*, 66 AM. POL. SCI. REV. 1295, 1297-99 (1972) (discussing why career representatives leave the House without mentioning resignation's constitutionality); Daniel Diermeier, Michael Keane & Antonio Merlo, *A Political Economy Model of Congressional Careers*, 95 AM. ECON. REV. 347, 347-49 (2005) (discussing congressional career spans without mentioning constitutional issues surrounding resignation); Morris P. Fiorina, David W. Rohde & Peter Wissel, *Historical Change in House Turnover*, in CONGRESS IN CHANGE: EVOLUTION AND REFORM 24 *passim* (Norman J. Ornstein ed., 1975) (discussing congressional career spans without mentioning resignation); Stephen E. Frantzich, *Opting Out: Retirement from the House of Representatives, 1966-1974*, 6 AM. POL. Q. 251, 251-54 (1978) (discussing representatives' decisions to retire but failing to differentiate retirement from resignation); Richard L. Hall & Robert P. van Houweling, *Avarice and Ambition in Congress: Representatives' Decisions to Run or Retire from the U.S. House*, 89 AM. POL. SCI. REV. 121, 121-22 (1995) (developing a rational choice-based model of when members voluntarily leave the House without discussing the constitutionality of resignation); Rebekah Herrick & David L. Nixon, *Is There Life After Congress? Patterns and Determinants of Post-Congressional Careers*, 21 LEGIS. STUD. Q. 489, 489-90 (1996) (analyzing postcongressional careers without discussing the constitutionality of resigning to pursue such careers); D. Roderick Kiewiet & Langche Zeng, *An Analysis of Congressional Career Decisions, 1947-1986*, 87 AM. POL. SCI. REV. 928, 928-29 (1993) (discussing the factors influencing members' decisions on whether to leave their seats without ever mentioning the constitutionality of resignation); David L. Leal, *Home Is Where the Heart Is: Congressional Tenure, Retirement, and the Implications for Representation*, 30 AM. POL. RES. 265, 271-72 (2002) (discussing postcongressional lobbying careers without mentioning the constitutionality of resigning to pursue such careers); Harvey D. Palmer & Ronald J. Vogel, *Political Opportunity for Federal Appointment: The Case of Departing Members of the U.S. House of Representatives, 1961-1992*, 57 J. POL. 677, 685-86 (1995) (discussing motives for congressional resignations without mentioning the constitutionality of those resignations); Douglas Price, *Careers and Committees in the American Congress: The Problem of Structural Change*, in 2 THE CONGRESS OF THE UNITED STATES: PATTERNS OF RECRUITMENT, LEADERSHIP, AND INTERNAL STRUCTURE, 1789-1989, *supra*, at 385, 395 tbls.1-4 (noting the number of House resignations in several Congresses, but providing no analysis of these numbers); H. Douglas Price, *The Congressional Career: Then and Now*, in CONGRESSIONAL BEHAVIOR 14, 16-19 (Nelson W. Polsby ed., 1971) (noting only the frequency with which House members have left to run for other offices).

8. See WM. HOLMES BROWN & CHARLES W. JOHNSON, *HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE* § 23-4, at 484-85 (2003) (noting the procedure for resigning without considering its constitutionality); CLARENCE CANNON, *CANNON'S PROCEDURE IN THE HOUSE OF REPRESENTATIVES* 489 (1963) (noting that a resignation, once tendered, cannot be withdrawn—this is the only section mentioning resignation in the manual); LUTHER STEARNS CUSHING, *LEX PARLIAMENTARIA AMERICANA: ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA* 50, 186, 196 (Boston, Little, Brown & Co., 9th ed. 1874) (asserting, without any analysis or supporting evidence, that representatives may refuse to serve and that resignation creates a vacancy in all American legislative bodies); FLOYD M. RIDDICK, *CONGRESSIONAL PROCEDURE* 13 n.41 (1941) (devoting less than a footnote to the issue of resignation from the House); CHARLES TIEFER, *CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE* (1989) (making no mention at all of resignation); Thomas Jefferson, *Manual of Parliamentary Practice*, in CONSTITUTION OF THE UNITED STATES OF AMERICA, WITH THE AMENDMENTS THERETO: TO WHICH ARE ADDED JEFFERSON'S MANUAL OF PARLIAMENTARY PRACTICE, THE STANDING RULES AND ORDERS

but this hitherto overlooked difference in wording between the House and Senate Vacancies Clauses should at least provide the starting point for further inquiry. This is all the more so because this issue also has implications extending far beyond the resignability of House seats, raising important questions about the interplay between liberal and republican values in the American constitutional order.

Whatever the differences amongst republican theorists,⁹ I take them to share at least two common principles. First, in Machiavelli's words, the "laws make [people] good."¹⁰ That is, the laws—which should be taken to mean not merely formal statutes and decisions, but also the more informal norms that constitute the governance of a polity—both educate citizens to desire to act in virtuous ways and constrain them from acting badly.¹¹ And second, political actors have an obligation to act in furtherance of the public good rather than simply to pursue their own private ends.¹² The first principle suggests

FOR CONDUCTING BUSINESS IN THE HOUSE OF REPRESENTATIVES AND SENATE OF THE UNITED STATES, AND BARCLAY'S DIGEST 43 (Washington, Government Printing Office 1861) (same).

9. And there are, indeed, significant differences. For an attempt to catalogue the various republicanismisms, see Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1564–76 (1988).

10. NICCOLÒ MACHIAVELLI, *THE DISCOURSES*, 112 (bk. I, ch. 3) (Bernard Crick ed., Leslie J. Walker trans., Penguin Books 1998) (1531).

11. See J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 136–37 (2d ed. 2003) (noting that, in republican theory, the task of the legislator is to eliminate the citizenry's corrupt "second nature" to allow for the restoration of its intrinsically good primal nature); *id.* at 284–85 (describing how the institutional arrangements of the Venetian city state "mechanized *virtù*"); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 39 (1985) (identifying "education and inculcation of virtue" as "traditional republican means" of governance).

12. See MACHIAVELLI, *supra* note 10, at 275 (bk. II, ch. 2) ("[I]t is not the well-being of individuals that makes cities great, but the well-being of the community; and it is beyond question that it is only in republics that the common good is looked to properly in that all that promotes it is carried out . . ."); Pocock, *supra* note 11, at 75–76 (noting that service of the public good, rather than private interests, is crucial to a republican polity's survival); *id.* at 201 ("The republic is the common good; the citizen, directing all his actions toward that good, may be said to dedicate his life to the republic . . ."); *id.* at 249–50 ("[O]bserve is a form of civic *virtù*; it is attained in serving the common good, and in pursuing it and its concomitant values above all others, we are proclaiming the supremacy of the common good."); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 18 (1986) (describing republicanism as oriented around the subordination of private ends to public ones); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 551 (1986) ("Republicanism, unlike liberalism, exalts the good of the whole over the good of its individual members. Where liberalism finds the primary purpose of government to be promotion of the diverse goods of its individual citizens, republicanism finds

the importance of leadership by example—that is, the obligation of those in power to educate others in civic virtue by demonstrating their own commitment to virtuous behavior. The second principle suggests a stark contrast with a liberal, interest-group theory of politics. The republican does not believe that the common good is promoted as an unintended byproduct of individuals' pursuit of their private goods. Rather, the public good is independent and must be pursued independently by citizens and rulers alike.¹³ In short, republican theory suggests that those in power have an obligation both to behave virtuously, by putting the public good ahead of their own private ends, and to promote virtue in the citizenry by being seen to act virtuously.

Drawing on republican theory, this Article suggests that there are good reasons for treating resignation from the House as a matter of congressional grace rather than one of constitutional right. Under the interpretation suggested here, a member's resignation would not become effective until accepted by a vote of the House, and, in certain limited circumstances, the House would be justified in refusing that acceptance.

Part I of this Article traces the history of procedures used for leaving the British House of Commons. Although these procedures have changed over the centuries, they have never included resignation as a legal right; moreover, at the time of the American Founding, it was not always the case that a member who wished to leave the House of Commons would be able to do so. Part II shows that this understanding carried over into preconstitutional American

its primary purpose to be definition of community values and creation of the public and private virtue necessary for societal achievement of those values.”); Sunstein, *supra* note 9, at 1550 (“[I]n their capacity as political actors, citizens and representatives are not supposed to ask only what is in their private interest, but also what will best serve the community in general—understood as a response to the best general theory of social welfare.” (footnote omitted)).

13. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 606–08 (rev. ed. 1998) (opposing the classical republican conception of a polity bound together by social structure and a unity of interests with the modern liberal conception of competing interest groups vying for public advantage); Michelman, *supra* note 12, at 21 (“Republicanism contests with a so-called pluralist vision, which regards the political system as, ideally, designed to serve the self-defined private interests of individuals or groups, fairly represented in political forums, where they compete under fair rules for fair shares of the outputs of public policy.”); Philip Pettit, *Reworking Sandel's Republicanism*, 95 J. PHIL. 73, 95 (1998) (book review) (contrasting republicanism with interest-group pluralism); Suzanna Sherry, *Republican Citizenship in a Democratic Society*, 66 TEX. L. REV. 1229, 1229 (1988) (book review) (contrasting “the liberal focus on communities as aggregations of individuals” with “the republican focus on individuals as members of communities”).

practice. Neither the colonial legislatures, nor the pre-1789 state legislatures (with a single exception), nor the Continental Congress under the Articles of Confederation recognized an individual's right to resign. Part III shows that the available evidence from the drafting, ratification, and early commentary on the Constitution strongly suggests that the founding generation, too, had this understanding in mind. Specifically, this Part shows that the difference in wording between the House and Senate Vacancies Clauses was intentional, and it demonstrates that there are good structural reasons for treating the two chambers differently. Part IV traces the deviation from this interpretation, beginning in the Second Congress and continuing to the present day. Part V, however, offers two paradigm cases for returning to the original meaning. These cases—one of which deals with members who wish to leave the House while they stand accused of ethical transgressions and the other of which deals with members who wish to leave because legislative service is simply no longer convenient for them—both suggest that a turn toward a more republican conception of legislative service would be valuable.

I. LEAVING THE HOUSE OF COMMONS

A. *Before the Chiltern Hundreds*

In 1624, there were three candidates for the two parliamentary seats for the County of Gloucester: Robert Poyntz, John Dutton, and Sir Thomas Estcourt.¹⁴ Estcourt “declared openly” that he was voting for his rivals, “as not desiring the place for himself, but praying to be spared.”¹⁵ He was, however, returned for one of the seats, and the election was challenged in the House of Commons’ Committee of Privileges and Elections.¹⁶ The first question addressed by the committee¹⁷ was “[w]hether Sir Thomas Estcourt was eligible, against his own consent, and contrary to his desire.”¹⁸ The committee concluded that he was eligible because

14. JOHN GLANVILLE, REPORTS OF CERTAIN CASES DETERMINED AND ADJUDGED BY THE COMMONS IN PARLIAMENT IN THE TWENTY-FIRST AND TWENTY-SECOND YEARS OF THE REIGN OF KING JAMES THE FIRST 99 (London, Baker & Leigh 1775).

15. *Id.* at 100.

16. *Id.* at 99.

17. The committee also inquired into reports of polling irregularities in Gloucester, *see id.* at 101–03, but that inquiry is not relevant for this Article.

18. *Id.* at 101.

no man, being lawfully chosen, can refuse the place; for the country and commonwealth have such an interest in every man, that when, by lawful election, he is appointed to this public service, he cannot, by any unwillingness, or refusal, of his own, make himself incapable; for that were to prefer the will, or contentment, of a private man, before the desire and satisfaction of the whole country, and a ready way to put by the sufficientest men, who are commonly those, who least endeavour to obtain the place.¹⁹

The House accepted its committee's conclusion,²⁰ and Estcourt took his seat.

This strident assertion of republican obligation, in the face of countervailing personal inclination, was hardly new in 1624. Indeed, the idea that members of Parliament were obligated to serve dated back to the institution's inception. Parliament's origins lie in the medieval *curia regis*, the king's council;²¹ as a body meant to assist the Crown, the king naturally had an interest in its composition.²² As Professor Kemp has noted, "[p]ermission to be excused from serving the king in parliament was a privilege which the king was seldom willing to grant."²³ She identifies only illness, royal service overseas, and captivity as grounds for resignation.²⁴ When the king sought advice from a subject, the subject was bound to deliver it.²⁵

19. *Id.*

20. *Id.* at 103.

21. See JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* 22 (1999) ("The first parliaments were meetings of the King and his tenants-in-chief, in which he sought their counsel, consent, and material support in discharging his principal responsibilities, the defence of the realm and the dispensation of justice within it. The acts of those parliaments were acts of the King, and their authority was his authority, fortified by counsel and consent."); CHARLES HOWARD MCILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY: AN HISTORICAL ESSAY ON THE BOUNDARIES BETWEEN LEGISLATION AND ADJUDICATION IN ENGLAND 14-38* (1910) (tracing the development of Parliament).

22. See JOSH CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 145-47 (2007) (noting that royal officials settled parliamentary election controversies until the late-sixteenth century).

23. Betty Kemp, *The Stewardship of the Chiltern Hundreds*, in *ESSAYS PRESENTED TO SIR LEWIS NAMIER* 204, 205 (Richard Pares & A.J.P. Taylor eds., 1956).

24. *Id.* at 205 n.1.

25. See 1 EDWARD PORRITT, *THE UNREFORMED HOUSE OF COMMONS: PARLIAMENTARY REPRESENTATION BEFORE 1832*, at 239 (2d ed. 1909) (noting the Crown's punishment of members who withdrew from Parliament without leave in 1554); see also A.F. POLLARD, *FACTORS IN MODERN HISTORY* 107 (1907) (noting that, under the Tudors, "[p]arliamentary representation was an irksome duty; men could no more resign a seat in Parliament than they can to-day resign their obligation to serve on juries or pay rates and taxes").

During Elizabeth's reign, the House of Commons began successfully to assert exclusive jurisdiction to determine questions about its own composition,²⁶ including jurisdiction to determine whether a member would be permitted to resign.²⁷ The House, however, proved no more willing to excuse its members from service than the Crown had—it allowed resignations only for sickness or other public service,²⁸ and sometimes not even for those. In November 1605, two members sought leave to resign. John Hassard, a member for Lyme Regis, insisted that he was unable to serve “by Reason of the Gout.”²⁹ The Committee of Privileges reported that Hassard came before them and that he “walked in Fear only.”³⁰ The committee nevertheless recommended “[t]hat he should serve still,”³¹ and the House agreed.³² (The precise reasons for refusing to allow Hassard to leave the House at this point are unclear, but the committee may have concluded that he simply was not sick enough to get out of his obligations.) Indeed, he remained in the House until 1609, when his constituents petitioned the House to allow him to resign.³³ The committee found that he was “incurable—bed-rid,” and he was finally allowed to leave the House.³⁴ However, on the same day in 1605 that Hassard first sought to resign his seat, William Swaddon, the member for Calne, asked to be excused on the grounds that he was “[w]eak, and not able to serve, by Reason of Age, and not

26. See CHAFETZ, *supra* note 22, at 145–47 (discussing the House of Commons' vigorous and successful assertion of its right to judge disputes over the elections and qualifications of its members during the controversies surrounding the 1580 elections and the 1586 Norfolk election).

27. See Kemp, *supra* note 23, at 205 (“During Elizabeth's long parliament (1572–83) the House successfully claimed that it alone could authorize both the resignation of members and the issue of writs for by-elections to replace them.”).

28. *Id.* at 206.

29. 1 H.C. JOUR. 257 (Nov. 9, 1605).

30. *Id.* I take this to mean that only the fear of the House's displeasure induced him to leave his sickbed.

31. *Id.*

32. *Id.*

33. 3 T.H.B. OLDFIELD, THE REPRESENTATIVE HISTORY OF GREAT BRITAIN AND IRELAND: BEING A HISTORY OF THE HOUSE OF COMMONS, AND OF THE COUNTIES, CITIES, AND BOROUGHES, OF THE UNITED KINGDOM, FROM THE EARLIEST PERIOD 372 (London, Baldwin, Cradock & Joy 1816).

34. *Id.*

likely to recover.”³⁵ The committee recommended that he be excused, and the House allowed him to resign.³⁶

In addition to illness, the holding of other offices sometimes justified departure from the House. In 1606, at the beginning of a parliamentary session, the Lord Chancellor sent the Speaker of the House of Commons a list of seven members who had been appointed to royal offices since the previous parliamentary session.³⁷ On the advice of the Committee of Privileges, three of the members were excused from service and four were made to keep their parliamentary seats.³⁸ (The excused members were those who had been appointed to royal offices with life patents; the unexcused members were not appointed “for Life.”³⁹) Indeed, even the holding of an office legally incompatible with parliamentary service did not guarantee permission to resign. In 1629, John Lynn sought permission to leave the House, having been elected mayor of Exeter.⁴⁰ The House concluded, however, that, “being a Member of the House before he was elected Mayor, he ought to serve here,” and give up the mayoralty.⁴¹

This was the milieu in which Thomas Estcourt was required to serve against his own wishes. Parliamentary service, which began as a royal duty, had become a republican one. This republican spirit continued for the rest of the seventeenth century. In 1641, George Abbott, who had been returned for the borough of Guildford in Surrey,⁴² requested that he be allowed to “decline his Election; and that a new Burgess be chosen to serve in his Stead.”⁴³ The *Journal of the House of Commons* notes tersely, “The Motion was not thought fit to be granted.”⁴⁴ After the Restoration, the standards for resignation seem to have loosened—in 1677, a member-elect was

35. 1 H.C. JOUR. 257 (Nov. 9, 1605).

36. *Id.*

37. *Id.* at 315–16 (Nov. 19, 1606).

38. *Id.* at 323–24 (Nov. 22, 1606).

39. *Id.*

40. *Id.* at 920 (Jan. 20, 1629). The House of Commons forbade simultaneous service as a mayor and as a member of Parliament. *See id.* at 246 (June 25, 1604) (resolving that “no Mayor of any City, Borough, or Town corporate, should be elected, returned, or allowed to serve as a Member of this House”).

41. *Id.* at 920 (Jan. 20, 1629).

42. Abbott’s first name and constituency can be found in 1 U.K. HOUSE OF COMMONS, MEMBERS OF PARLIAMENT: PARLIAMENTS OF ENGLAND, 1213–1702, at 494 (London, Hansard 1878).

43. 2 H.C. JOUR. 201 (July 6, 1641).

44. *Id.*

allowed to “disclaim and renounce his Election” without any reason specified in the *Journal*.⁴⁵ Importantly, however, this resignation was not of right: the *Journal* makes a point of noting that “the House allowed thereof.”⁴⁶ (It should also be noted that members-elect could refuse to take the necessary oaths and thereby disqualify themselves.⁴⁷ This method of refusing a seat was unavailable, however, to a member who wished to resign a seat he already occupied or a member-elect who was uncomfortable refusing to swear the Oaths of Supremacy and Allegiance.)

In the early eighteenth century, however, a series of statutes that were intended to limit the Crown’s power over Parliament had the unintended consequence of creating new possibilities for leaving the House.

B. Statutory Incompatibility Provisions

In 1701, as it became clear that neither the widowed King William III nor his successor, Princess Anne, would have any heirs, Parliament passed the Act of Settlement to ensure that a clear line of succession would prevent the Crown from falling back into the hands of the Catholic Stuarts.⁴⁸ In addition to providing for the Crown to pass to the House of Hanover, the Act created several limitations on royal power to take effect when both William and Anne were dead.⁴⁹ One such limitation was the provision that “no Person who has an Office or Place of Profit under the King or receives a Pension from the Crown shall be capable of serving as a Member of the House of

45. 9 H.C. JOUR. 402 (Mar. 19, 1677).

46. *Id.*

47. See 2 JOHN HATSELL, PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS 79 (photo. reprint 1971) (London, Hansard, 4th ed. 1818) (reporting the occurrence of this practice in the 1689 Monson and 1698 Archdale cases).

48. Act of Settlement, 12 & 13 Will. 3, c. 2. (1701).

49. *Id.* § 3 (noting that these provisions were necessary to secure “our Religion Laws and Liberties from and after the Death of His Majesty and the Princess Ann of Denmark”). The Act of Settlement can be understood as a second bill of rights. In the first Bill of Rights, 1689, 1 W. & M., c. 2, Parliament conditioned granting the Crown to the House of Orange on significant limitations on royal power. The very idea that the Crown was the Parliament’s to grant is seen as definitively establishing parliamentary supremacy in the English Constitution. See GOLDWORTHY, *supra* note 21, at 159–60; COLIN R. MUNRO, STUDIES IN CONSTITUTIONAL LAW 128 (2d ed. 1999). Just as the 1689 Parliament gave the House of Orange a choice between a Crown reduced in power and no crown at all, so the 1701 Parliament gave a similar choice to the House of Hanover. This explains why the limitations were not to take effect until both William and Anne were dead—had the Act attempted to limit royal power immediately, it might well have been denied royal assent.

Commons.”⁵⁰ The goal was to prevent undue royal influence over Parliament, but the means employed were too crude—the provision would have prevented even secretaries of state from serving in the House of Commons, a radical alteration of the traditional theory of English government, which had no strict principle of separation of powers and in which ministers of the Crown were frequently drawn from the House.⁵¹

Before that provision of the Act of Settlement could come into effect, it was repealed by the 1705 Regency Act.⁵² In its place, the Act excluded from the House of Commons anyone holding one of an enumerated list of Crown offices, anyone holding a Crown office created after 1705, or anyone holding a pension at the pleasure of the Crown.⁵³ Moreover, any member of the House of Commons who accepted “any Office of Profit from the Crown during such Time as he shall continue a Member” voided his election; however, so long as the office was not one of those enumerated, he could stand for reelection to the House of Commons.⁵⁴ If reelected, he could hold both positions.⁵⁵ (Members who served in the army or navy and received a promotion did not, however, void their elections.⁵⁶) These provisions were to come into effect at the end of the Parliament that passed them⁵⁷—under the Triennial Act, that could be no later than 1708.⁵⁸ In 1707, these provisions were repassed, essentially verbatim.⁵⁹

50. Act of Settlement, c. 2, § 3.

51. See THEODORE F.T. PLUCKNETT, *TASWELL-LANGMEAD’S ENGLISH CONSTITUTIONAL HISTORY, FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME* 467 (11th ed. 1960) (“[Z]eal had outrun discretion in the Act of Settlement, which seemingly would have excluded even such place-holders as Secretaries of State or the Chancellor of the Exchequer. That rule would have given us a strict separation of executive and legislative organs such as still exists in the United States.”).

52. Regency Act, 1705, 4 & 5 Ann., c. 20, § 28.

53. *Id.* § 29.

54. *Id.* § 30.

55. *Id.*

56. *Id.* § 32.

57. *Id.* §§ 29–30.

58. See Triennial Act, 1694, 6 & 7 W. & M., c. 2, § 3 (providing that no Parliament could last longer than three years).

59. See 6 Ann., c. 41, §§ 24–27 (1707). The 1705 Regency Act, like the 1701 Act of Settlement, was primarily concerned with the succession to the English Crown. In 1707, the Act of Union with Scotland, 1707, 6 Ann., c. 11, created the United Kingdom of Great Britain. The 1707 Regency Act was passed to address the same issues with respect to the *British* Crown. As the union raised no new issues with regard to incompatibility, those provisions were simply repeated with only minor and inconsequential alterations in wording.

Apparently impatient for the incompatibility rules to come into effect, the House of Commons resolved to enforce them in the present Parliament,⁶⁰ and a number of members were shortly thereafter declared incompatible.⁶¹

By 1715, at the latest,⁶² members had figured out that they could use the incompatibility provisions as a means of giving up their seats. This is well illustrated by a series of events between 1715 and 1717. On November 21, 1715, Richard Onslow accepted the royal office of teller of the exchequer, thereby vacating his seat in the House of Commons, where he represented the County of Surrey.⁶³ His appointment as teller of the exchequer was a compensation for being forced out of the chancellorship of the exchequer, a position that he held for about a year.⁶⁴ Teller of the exchequer was a substantial sinecure,⁶⁵ and there is no indication that he accepted the position solely for the purpose of leaving his seat.⁶⁶ He had also been promised a peerage, although he waited until the next year to take out his patent.⁶⁷ However, on the same day that Richard Onslow accepted the tellership, his son,⁶⁸ Thomas Onslow, also vacated his seat in the House, where he represented Bletchingly, by becoming "Out Ranger of his Majesty's Forest of *Windsor*."⁶⁹ (Rangers were royal officials whose job it was to patrol the edges, or "purlieus," of forests and

60. 15 H.C. JOUR. 396 (Nov. 10, 1707).

61. See, e.g., *id.* at 420 (Nov. 12, 1707) (ordering the issuance of new writs of election for six members declared incompatible by operation of the new rules).

62. See Kemp, *supra* note 23, at 207 ("It is not possible . . . to say definitely how many of the eighty or so members who lost seats [during the first half of the eighteenth century] as a result of appointment to office used their offices for the purpose of quitting their seats.").

63. 18 H.C. JOUR. 328 (Nov. 21, 1715).

64. 2 ROMNEY SEDGWICK, THE HOUSE OF COMMONS, 1715-1754, at 310 (1970).

65. See 5 EVELINE CRUICKSHANKS, STUART HANDLEY & D.W. HAYTON, THE HOUSE OF COMMONS, 1690-1715, at 36 (2002) (describing the tellership as "lucrative").

66. See *id.* (noting that "his evident dismay at losing the [chancellorship] was to some degree alleviated" by the tellership).

67. Onslow apparently waited to take out his patent to avoid the appearance of impropriety:

[H]aving been a member of the House of Commons committee whose report had led to the impeachment of the heads of the late Tory Government, he was reluctant to take out his patent until the impeachments were out of the way, so that 'they who had been accusers might not sit as judges in the same cause.' After some months, owing to the delay in trying Lord Oxford, he compromised by taking out his patent and abstaining from voting on anything relating to the impeachments.

2 SEDGWICK, *supra* note 64, at 310-11.

68. *Id.* at 311.

69. 18 H.C. JOUR. 328 (Nov. 21, 1715).

drive back into the forest any deer that might seek to explore life in the larger world.⁷⁰ The out ranger was likely a ranger who did not live in—and therefore, did not actually patrol—the forest for which he was responsible.⁷¹ The job was thus an office without responsibilities.) Although this office came with a large sinecure,⁷² Thomas also viewed it as a means of vacating his seat, as he immediately stood for and was elected to his father's old seat in Surrey.⁷³ In 1717, his father, who by then had accepted his peerage, died.⁷⁴ Thomas Onslow was now Lord Onslow, thus making him a member of the House of Lords and requiring that a new writ be issued for a representative of Surrey in the House of Commons.⁷⁵ Five days later, Richard's uncle, Denzil Onslow,⁷⁶ who represented Guildford in the House of Commons, vacated his seat by accepting the post of out ranger of Windsor Forest.⁷⁷ Denzil then stood for and was elected to the Surrey seat.⁷⁸

Surrey was clearly a more desirable seat for members of the Onslow family—it was a county seat, whereas Bletchingly and Guildford were both borough seats,⁷⁹ and county seats had long been more prestigious.⁸⁰ The family thus used its royal connections⁸¹ to get

70. See JOHN MANWOOD, *MANWOOD'S TREATISE OF THE FOREST LAWS* 313–15 (William Nelson ed., London, Nutt, 4th ed. 1717). This job may sound silly, but it must be remembered that, although the Crown did not own all of the land in the forest, it did own all of the beasts of the forest. See 6 *HALSBURY'S LAWS OF ENGLAND* § 2, para. 1149 (Viscount Hailsham ed., 2d ed. 1932). The ranger thus served to ensure that the king's venison did not wander away.

71. See 10 *THE OXFORD ENGLISH DICTIONARY* 1001 (2d ed. 1989) (defining “out-” as “[i]n the sense, ‘Living, residing, or engaged outside (a house, hospital, borough, city, country, etc.)’, usually as distinguished from those of the same body or class living, residing, etc., within” and giving “out-ranger” as an example). The fact that Thomas Onslow was simultaneously a member of Parliament for Surrey, see *infra* text accompanying note 73, and the out ranger of Windsor Forest strengthens this interpretation. It seems unlikely that he was sitting in the House of Commons by day and chasing deer by night.

72. 5 *CRUICKSHANKS ET AL.*, *supra* note 65, at 39.

73. *Id.*; 2 *SEDGWICK*, *supra* note 64, at 311.

74. 2 *SEDGWICK*, *supra* note 64, at 310–11.

75. 18 *H.C. JOUR.* 658 (Dec. 13, 1717).

76. Denzil Onslow (c. 1642–1721) was a younger son of Sir Richard Onslow (1601–64). Denzil's older brother Arthur was Sir (later Lord) Richard Onslow's (1654–1717) father. See 5 *CRUICKSHANKS ET AL.*, *supra* note 65, at 18–40; 2 *SEDGWICK*, *supra* note 64, at 309–12.

77. 18 *H.C. JOUR.* 660 (Dec. 18, 1717).

78. 2 *SEDGWICK*, *supra* note 64, at 309–10.

79. See 5 *CRUICKSHANKS ET AL.*, *supra* note 65, at 18–40.

80. See, e.g., J.E. NEALE, *THE ELIZABETHAN HOUSE OF COMMONS* 313 (1949) (noting that in each of the ten instances of fathers and sons sitting together in the 1571 parliament, “the fathers sat for their county and the sons for boroughs, mostly within the county”); LAWRENCE STONE & JEANNE C. FAWTIER STONE, *AN OPEN ELITE? ENGLAND 1540–1880*, at 241 (1984) (“Borough MPs could often buy their seats or intimidate the electorate. The position of Knight

Thomas and Denzil appointed to an insignificant office that, by virtue of the incompatibility clauses, vacated their seats, thus allowing them to stand for the Surrey seat when it became available. Other members seem to have learned from the Onslows, and a number of others vacated seats in similar manners between 1715 and 1750.⁸²

C. *The Chiltern Hundreds*

Beginning in the 1750s, royal stewardships—principally, the stewardship of the Chiltern Hundreds—came into use as the primary means of vacating House seats. The three Chiltern Hundreds of Stoke, Desborough, and Burnham, in Buckinghamshire,⁸³ were royal properties at least as early as the reign of Edward I.⁸⁴ The Hundreds were administered by a steward, an office of profit under the Crown, appointed in the exchequer.⁸⁵ By the eighteenth century, the office had ceased to carry any administrative functions, nor was it any longer a source of measurable profit.⁸⁶ It was still formally an office of profit under the Crown,⁸⁷ however, and therefore holding it triggered the statutory incompatibility rule.⁸⁸

In 1751, the stewardship of the Chiltern Hundreds was first used as a means of leaving the House. On the same day that two seats in

of the Shire [that is, the holder of a county seat], on the other hand, was at the choice of the leading squires and nobility of the county"); E.A. Wasson, *The Penetration of New Wealth into the English Governing Class from the Middle Ages to the First World War*, 51 *ECON. HIST. REV.* (n.s.) 25, 30 (1998) (noting that members of the English landed elite served as "shire knights if possible and borough members if necessary").

81. See 5 CRUICKSHANKS ET AL., *supra* note 65, at 36 (noting Richard Onslow's "strong position at court"); *id.* at 39 (noting the "favour of the new King [George I]" bestowed upon Thomas Onslow and his subsequent favor with George II).

82. See Kemp, *supra* note 23, at 208 (noting the likely use of several other Crown offices for the purpose of leaving House of Commons seats in the first half of the eighteenth century).

83. For a map of the Chiltern Hundreds, see U.K. HOUSE OF COMMONS INFO. OFFICE, *THE CHILTERN HUNDREDS* app. A (2008), available at <http://www.parliament.uk/documents/upload/p11.pdf>.

84. 3 *ENCYCLOPÆDIA OF THE LAWS OF ENGLAND* 100 (E.A. Jelf ed., 3d ed. 1938).

85. *Id.*

86. *Id.*; U.K. HOUSE OF COMMONS INFO. OFFICE, *supra* note 83, at 3.

87. See 2 HATSELL, *supra* note 47, at 55 n.§ (recognizing that the stewardship is formally an office of profit, but suggesting that only longevity of use prevents one from questioning whether any *profit* in fact accrues to the steward).

88. The logistics of holding the stewardship are simple: a member applies to the chancellor of the exchequer for the office. If it is granted, the member's seat in the House is immediately vacated. The member continues to hold the stewardship until the next appointment to the stewardship, which revokes the patent of the previous officeholder. See U.K. HOUSE OF COMMONS INFO. OFFICE, *supra* note 83, at 2.

Dorchester were declared vacant,⁸⁹ John Pitt vacated his seat in Wareham by accepting the Stewardship of the Chiltern Hundreds.⁹⁰ He promptly stood for and was elected to one of the vacant Dorchester seats. The next year, we find the first instance of a member using a stewardship to retire altogether. Henry Lascelles, who represented Northallerton, vacated that seat by accepting “the Office of Chief Steward and Keeper of the Courts of the Honour of *Berkhamstead*, and of the Manor, Lordship, and Town of *Berkhamstead*,”⁹¹ a post similar to the stewardship of the Chiltern Hundreds. His son, Daniel, stood for and was elected to his old seat, and Henry Lascelles died the next year.⁹² In 1753, Henry Vane, who represented Durham, was elevated to the peerage, thus vacating his seat.⁹³ The same day, his son (also named Henry) accepted the stewardship of the Chiltern Hundreds, thus vacating the seat for Downton.⁹⁴ The younger Vane immediately stood for and won his father’s old seat.⁹⁵ And in 1757, William Pitt the Elder accepted the stewardship of the Chiltern Hundreds (much as his cousin John had done six years earlier), thus vacating the seat for Okehampton,⁹⁶ which he had held for only about seven months.⁹⁷ Pitt had just become prime minister, and he took the opportunity to switch constituencies to Bath, his second home and a seat that he would not have to work very hard to retain.⁹⁸

89. See 26 H.C. JOUR. 5 (Jan. 18, 1751) (noting vacancies created by Nathaniel Gundry’s acceptance of a justiceship on the Court of Common Pleas and by John Browne’s death).

90. *Id.*

91. 26 H.C. JOUR. 497 (Mar. 17, 1752).

92. 2 SEDGWICK, *supra* note 64, at 199–200.

93. 26 H.C. JOUR. 805 (May 4, 1753).

94. *Id.*

95. 2 SEDGWICK, *supra* note 64, at 491.

96. 27 H.C. JOUR. 926 (July 1, 1757).

97. See 1 BASIL WILLIAMS, *THE LIFE OF WILLIAM PITT, EARL OF CHATHAM* 290 (1913) (noting that Pitt stood for the Okehampton seat in December 1756, having vacated his previous seat of Aldborough by becoming secretary of state).

98. *Id.* at 323–24 & 324 n.1. Pitt did not automatically vacate his seat upon becoming prime minister because the position of prime minister was then unknown to the law—from a legal standpoint, the prime minister was simply a secretary of state, an office that Pitt had already held when elected to the Okehampton seat. See F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 396 (photo. reprint 1963) (H.A.L. Fisher ed., 1908) (noting that, “to this day the law knows no such person” as a prime minister). The prime minister was not mentioned in a statute until 1917. See O. HOOD PHILLIPS ET AL., *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 358 (8th ed. 2001). Because Pitt’s legal status as a Crown officer had not changed, his seat was not vacated under the 1705 and 1707 acts. See *supra* text accompanying note 55. Thus, to switch seats in 1757, Pitt had to apply for and receive the stewardship of the Chiltern Hundreds.

By the end of the 1750s, accepting a stewardship had become the usual way of leaving the House of Commons, and the Chiltern Hundreds quickly became the stewardship used for this purpose.⁹⁹ Indeed, it is still the case that members may resign only by accepting a Crown stewardship,¹⁰⁰ and “Chiltern Hundreds” has passed into common parlance.¹⁰¹ As is the case with all Crown powers of the type that Bagehot labeled “efficient,”¹⁰² the power of granting the Chiltern Hundreds now actually resides with the ministry of the day—in this case, it resides with the chancellor of the exchequer.¹⁰³

Crucially, however, the granting of the Chiltern Hundreds remained discretionary for quite some time. Indeed, the Chiltern Hundreds “were regarded, like other patronage, as something to which the opponents of the Government had no claim.”¹⁰⁴ Thus, in 1774, when Nathaniel Bayly, who had opposed the government on sensitive issues dealing with the increasingly rebellious American colonies,¹⁰⁵ sought the Chiltern Hundreds in order to stand for a different seat, Lord North (who was, at the time, both chancellor of

99. See Kemp, *supra* note 23, at 208–10 (noting the growing use of the stewardship in the second half of the eighteenth century).

100. In contemporary Britain, the stewardship of the Chiltern Hundreds and the stewardship of the Manor of Northstead are granted alternately to members who wish to resign. For a list of members who accepted these offices between 1970 and 2008, see U.K. HOUSE OF COMMONS INFO. OFFICE, *supra* note 83, at app. B.

101. See, e.g., G.K. CHESTERTON, ALARMS AND DISCURSIONS 155–59 (1910) (describing the author’s fantasy of running for Parliament, taking the Chiltern Hundreds, and then demanding to exercise the duties of the office); 1 ANTHONY TROLLOPE, PHINEAS FINN, THE IRISH MEMBER 39–42 (New York, Harper & Bros. 1868) (telling the story of Phineas Finn, a young member of Parliament, contemplating taking the Chiltern Hundreds); Editorial, *A Celebrity for All Seasons*, TIMES (London), Jan. 7, 2006, at 21 (noting member of Parliament George Galloway’s performance on the *Big Brother* reality television show and suggesting that “[p]erhaps *Celebrity* [*Big Brother*] is the modern equivalent of the Chiltern Hundreds for [the] Respect [Party],” of which Galloway is the most high-profile member); Andrea Felsted, *Chairman Norris Castigated for Jarvis ‘Shambles’*, FIN. TIMES (London), Oct. 15, 2004, at 21 (reporting on an investigator telling the chairman of the Jarvis company that the chairman “could not be trusted with the Chiltern Hundreds, let alone with Jarvis”).

102. See WALTER BAGEHOT, THE ENGLISH CONSTITUTION 7–11 (Miles Taylor ed., New York, Oxford Univ. Press 2001) (1867) (differentiating the dignified, or ceremonial, aspects of the Constitution from the efficient, or functional, aspects, and locating the dignified aspects in the Monarch and the efficient aspects in the government of the day).

103. 3 ENCYCLOPÆDIA OF THE LAWS OF ENGLAND, *supra* note 84, at 100.

104. 1 PORRITT, *supra* note 25, at 245.

105. See 2 LEWIS NAMIER & JOHN BROOKE, THE HOUSE OF COMMONS, 1754–1790, at 67–68 (1964) (noting Bayly’s history of siding with the parliamentary opposition, including on matters of America policy).

the exchequer and prime minister) simply refused.¹⁰⁶ North again used the Chiltern Hundreds for partisan advantage in 1779, when John Glynn died, thus necessitating a by-election for his seat in Middlesex. Two members of the House sought the Chiltern Hundreds in order to stand for the Middlesex seat; North granted it only to the member sympathetic to the government, and he was returned for Middlesex.¹⁰⁷

Indeed, the Chiltern Hundreds were denied as late as the mid-nineteenth century. The 1841 elections were marked by allegations of bribery, leading to petitions challenging the seating of the returned members.¹⁰⁸ To escape investigation by a parliamentary committee, members struck "corrupt compromises," under which they agreed to apply for the Chiltern Hundreds and not run in the resulting by-elections; in return, the challengers, who would then stand for the seats unopposed, would withdraw their petitions.¹⁰⁹ After several of these "compromises" had been effectuated, the government caught on, and Viscount Chelsea's application for the Chiltern Hundreds, as part of a corrupt compromise, was denied.¹¹⁰ Since 1775, efforts have been repeatedly made to introduce a regularized system of withdrawal from the House of Commons, but they have consistently been defeated.¹¹¹

In short, resignation from the House of Commons has always been a concept foreign to British law. Parliamentary service was seen first as a royal duty, then as a republican one. Since the early eighteenth century, members have been able to leave the House by accepting a royal office of trust or profit. Since the middle of the eighteenth century, the primary office used for this purpose has been the stewardship of the Chiltern Hundreds. However, for a long time, the Chiltern Hundreds were not granted as a matter of course. And even when taking the Chiltern Hundreds later became common, it was seen as necessary to preserve the principle that leaving the House of Commons was a matter of grace. Indeed, during the crucial period of American constitutional development, the British practice was clear: no member had a *right* to resign from the legislature.

106. 18 WILLIAM COBBETT, *PARLIAMENTARY HISTORY OF ENGLAND* 416–18 (London, Hansard 1813); 1 PORRITT, *supra* note 25, at 245–46.

107. 1 PORRITT, *supra* note 25, at 247.

108. Kemp, *supra* note 23, at 212.

109. *Id.*

110. *Id.* at 213.

111. See Betty Kemp, *Resignation from the House of Commons*, 6 *PARLIAMENTARY AFF.* 211, 214–15 (1952) (summarizing the history of such attempts).

II. PRECONSTITUTIONAL AMERICAN PRACTICE

A. *Colonial Practice*

Evidence on how members left American colonial legislatures is scant, but the available information suggests that colonial representatives had no more right to resign their offices than did members of the House of Commons. As a general matter, the colonial assemblies tended to model themselves after the House of Commons, especially on matters relating to their privileges and procedures.¹¹² As Professor Greene has noted, colonial legislators looked to English sources for “a whole set of generalized and specific institutional imperatives for representative bodies, a particular pattern of behavior for their members, and a concrete program of political action.”¹¹³

Thus, for example, a 1706 Pennsylvania law provided an automatic fine for “any person or persons so *chosen and returned to serve* . . . [who] shall be absent from the service for which he or they shall be so *elected* . . . unless his or their excuse for such absence shall be allowed of by the Assembly.”¹¹⁴ Note that the fine applies to anyone “chosen and returned”—that is, anyone “elected.” It does not seem to have mattered whether or not the person wanted to serve. Indeed, the same act provided for a by-election whenever “any person so chosen and returned . . . shall happen to die or be willfully absent, or by vote of the House be disabled to sit or serve in Assembly.”¹¹⁵ In other words, the statute recognized the possibility that legislators might willfully absent themselves from their duties, and it accordingly provided a means for replacing them. But so far was this from a right to resign that it also made such behavior fineable.

Similarly, a 1715 North Carolina law provided that

112. See J.R. POLE, *POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC* 31 (1971) (noting that colonial “[a]ssemblies adopted for themselves the theory of the British House of Commons and modelled [*sic*] themselves on its precedents and procedures”).

113. JACK P. GREENE, *NEGOTIATED AUTHORITIES: ESSAYS IN COLONIAL POLITICAL AND CONSTITUTIONAL HISTORY* 197 (1994).

114. Act to Ascertain the Number of Members of Assembly and to Regulate the Election, 1705/06, *reprinted in* 2 *FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY* 1164, 1167 (W. Keith Kavenagh ed., 1973) (emphasis added).

115. *Id.*

whatsoever representative, so elected as aforesaid, shall fail in making his personal appearance and giving his attendance at the Assembly precisely at the day limited by the writ or on the day appointed for the meeting of the biennial Assembly . . . shall be fined for every day's absence during the sitting of the Assembly, unless by disability or other impediment to be allowed by the Assembly, twenty shilling, to be seized by a warrant from the Speaker.¹¹⁶

Again, note that the fine was for anyone who had been *elected* and failed to appear. Refusal of the seat would have to be “allowed by the Assembly” if the member did not wish to be fined. A Maryland law of the same year provided fines for any “elected” delegates who failed to “attend at the time and place of the meeting of such assembly, . . . unless upon sufficient excuse to be admitted by the house of delegates their absence be dispensed with.”¹¹⁷

A 1683 New York law provided for by-elections in the case of “death or removal of any of the said representatives”¹¹⁸—those apparently being the only means contemplated of vacating a seat. A 1721 South Carolina statute provided for by-elections if a legislator “should die or depart this province, or refuse to qualify him or themselves as in this act directed, or be expelled by the said House of Commons.”¹¹⁹ Refusal to qualify meant refusal to take the requisite oath¹²⁰—thus, a member of the South Carolina House of Commons, like a member of the British House of Commons,¹²¹ could refuse a seat by refusing to take the oath. But members who had already taken the oath, or members who felt honor bound to swear that they were “duly qualified to be chosen and serve as a member of the

116. Act Relating to the Biennial and Other Assemblies and Regulating Elections and Members in North Carolina (1715), *reprinted in* 3 FOUNDATIONS OF COLONIAL AMERICA, *supra* note 114, at 2009, 2010.

117. Act Directing the Manner of Electing and Summoning Delegates and Representatives to Serve in Succeeding Assemblies and for Ascertaining the Expenses of the Councilors, Delegates of Assembly, and Commissioner of the Provincial and County Courts of this Province (1715), *reprinted in* 2 FOUNDATIONS OF COLONIAL AMERICA, *supra* note 114, at 1030, 1031.

118. Charter of Liberties and Privileges of the Inhabitants of New York and Its Dependencies, October 30, 1683, *reprinted in* 2 FOUNDATIONS OF COLONIAL AMERICA, *supra* note 114, at 1051, 1052.

119. Act to Ascertain the Manner and Form of Electing Members to Represent the Inhabitants of This Province in the Commons House of Assembly, 1721, *reprinted in* 3 FOUNDATIONS OF COLONIAL AMERICA, *supra* note 114, at 1980, 1982–83.

120. *See id.* at 1982 (noting that each person must be qualified before swearing an oath).

121. *See supra* text accompanying note 47.

Commons House of Assembly . . . according to the true intent and meaning of this act,"¹²² would have no way of vacating their seats.

New Jersey seems to have had a similar rule. In 1770, John Ogden, a member of the colonial legislature from Essex, had to sell all of his property to pay his debts, thus putting him below the property requirement for legislative service.¹²³ He thus sought and received permission from the house to resign.¹²⁴ The house's granting him permission to resign, however, "was disputed by the governor and council on the ground that the resignation of a member had no precedent in parliament, while the house insisted that this made no difference as the decision of such questions lay wholly with the representatives."¹²⁵ We thus see a clash between the parliamentary privilege of each house to regulate its own composition¹²⁶ and the Crown's stance that only it could excuse a legislator from service.¹²⁷ Importantly, however, no one claimed that the decision was Ogden's alone.

It should be noted that the New Jersey Assembly had good reason to think that it, rather than the governor or council, should be the authority to allow or deny a member's request to give up his seat. It is true, as we have seen,¹²⁸ that the power of granting the Chiltern Hundreds to members of the House of Commons lay with the chancellor of the exchequer, a Crown official. And it is true that the

122. Act to Ascertain the Manner and Form of Electing Members to Represent the Inhabitants of This Province in the Commons House of Assembly, 1721, *reprinted in* 3 FOUNDATIONS OF COLONIAL AMERICA, *supra* note 114, at 1980, 1982.

123. MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 166 (1943).

124. *Id.*

125. *Id.* at 166–67.

126. See CHAFETZ, *supra* note 22, at 144–61 (tracing the history of parliamentary jurisdiction over election and qualifications disputes); POLE, *supra* note 112, at 505 ("Each colonial Assembly made itself in the image of the British House of Commons. It quickly established control over that vital factor, its own composition, claiming as the Commons had done under James I the power to judge the credentials of its own members.").

127. Here, the royal governor and his council stood as the Crown's representatives, much as the chancellor of the exchequer did in granting the Chiltern Hundreds. Colonial legislatures, it should be noted, had incompatibility rules similar to those in place in Britain. See, e.g., JACK P. GREENE, THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES, 1689–1776, at 187–89 (1963) (noting the exclusion of certain royal officeholders ("placemen") from the colonial assembly in Virginia, the Carolinas, and Georgia); ELMER I. MILLER, THE LEGISLATURE OF THE PROVINCE OF VIRGINIA: ITS INTERNAL DEVELOPMENT 56 (1907) ("As a rule a burgess could not hold any other office during his term as burgess.").

128. See *supra* Parts I.B–C.

colonial governor and council were also appointed by the Crown. But, as we have also seen,¹²⁹ by the mid-eighteenth century, Crown officers were *in fact* answerable to Parliament.¹³⁰ Members of Parliament who wished to leave the House thus sought permission from someone answerable to the House. Colonial governors, however, were not responsible to colonial legislatures.¹³¹ Allowing Crown officials to interfere in the composition of colonial legislatures thus violated the hard-won parliamentary privilege of a house to regulate its own composition¹³² in a way that allowing Crown officials (who are in fact answerable to the House) to interfere in the composition of the House of Commons does not. Thus colonial—and, as we shall soon see, state and national—legislatures asserted that they had the right to determine when and how their members could leave their seats.

B. *State Practice, 1776–1789*

The states in the formative years between independence and the drafting of the federal Constitution tended to follow the same practices as their colonial predecessors. The 1776 Pennsylvania Constitution provided for filling legislative “vacancies” by “certain and regular elections,”¹³³ without specifying how those vacancies could come about. It specifically provided, however, that members of the supreme executive council,¹³⁴ executive and judicial officers,¹³⁵ and justices of the peace¹³⁶ could resign. The omission of any mention of resignation for legislators, when it was specifically provided for in the

129. See *supra* text accompanying notes 102–03.

130. See MAITLAND, *supra* note 98, at 395–96 (noting that the principle of common ministerial responsibility to Parliament dates from the Walpole administration (1721–42)); see also MUNRO, *supra* note 49, at 56 (“Every Prime Minister since Walpole has been a member of either the House of Commons or the House of Lords, and we may say that there is another well established convention to that effect, which has ensured that governments have been responsible to Parliament.”).

131. See POLE, *supra* note 112, at 29 (“[T]he Governor, whether royal or proprietary, stood not only as the ‘executive’ in a ‘mixed’ form of government but represented an interest and a point of view that were not based in the colony in which he held his appointment.”); see also *id.* at 529 (“The monarchical element [in the colonies] was provided by the presence and very real power of the royal Governor—or the proprietary one, in Pennsylvania . . .”).

132. See CHAFETZ, *supra* note 22, at 144–61; see also *supra* text accompanying notes 26–27.

133. PA. CONST. of 1776, art. I, § 6, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3083 (Francis Newton Thorpe ed., 1906) [hereinafter THORPE].

134. *Id.* art. II, § 19, reprinted in 5 THORPE, *supra* note 133, at 3086–87.

135. *Id.* art. II, § 20, reprinted in 5 THORPE, *supra* note 133, at 3087–88.

136. *Id.* art. II, § 30, reprinted in 5 THORPE, *supra* note 133, at 3089.

case of so many other offices, raises a strong presumption that it was not permitted for legislators,¹³⁷ a presumption strengthened by the background British practice.¹³⁸

Indeed, an incident surrounding the calling of the Pennsylvania convention to ratify the proposed federal Constitution lends further support to the idea that resignation was impermissible in the Pennsylvania Assembly. On Friday, September 28, 1787, George Clymer introduced in the Pennsylvania Assembly a series of resolutions calling for a ratification convention.¹³⁹ The timing of the resolutions was important, as the third and final session of the Eleventh General Assembly of Pennsylvania was due to expire the next day, and a new assembly would be elected the next month.¹⁴⁰ The first resolution, which expressed the Assembly's general desire to call a convention, was considered the morning it was introduced and passed by a vote of forty-three to nineteen.¹⁴¹ The Assembly then adjourned until that afternoon without voting on the second resolution, which specified the date and procedures for electing delegates to the convention.¹⁴² When it reconvened, the nineteen members who voted against the first resolution did not attend, and the Assembly was left one member short of a quorum.¹⁴³ The Assembly sent its sergeant at arms to "collect the absent members,"¹⁴⁴ but they refused to appear.¹⁴⁵ The next day, another member refused to attend, leaving the Assembly two members short of a quorum.¹⁴⁶ The sergeant, accompanied by a clerk, was sent out to find the absent members, and, with the aid of private citizens, forcibly brought two of them to the legislative chambers.¹⁴⁷ One of the forcibly detained members, James M'Calmont, sought permission to be excused from

137. See *supra* note 6 (discussing the *expressio unius* canon of interpretation).

138. See *supra* Part I.

139. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 65–66 (Merrill Jensen ed., 1976).

140. *Id.* at 54.

141. *Id.* at 66–67.

142. *Id.* Herrington speculates that it adjourned for lunch in what he terms "an inexplicable parliamentary blunder." Matthew J. Herrington, *Popular Sovereignty in Pennsylvania, 1776–1791*, 67 TEMP. L. REV. 575, 603 (1994).

143. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 139, at 95.

144. *Id.*

145. See *id.* at 96–97 (reciting the dialogue between the Speaker and the sergeant).

146. *Id.* at 103.

147. *Id.* at 103–04, 110 n.1.

the House,¹⁴⁸ but, after lengthy debate,¹⁴⁹ it was “determined almost, if not quite, unanimously, in the negative.”¹⁵⁰ With a quorum thus assembled, the Assembly passed the resolution calling the ratifying convention.¹⁵¹

A quorum of the Pennsylvania Assembly consisted of “two-thirds of the whole number of members elected”¹⁵²—that is, the denominator would remain the same even if a seat were vacant.¹⁵³ Given that the Assembly was to be dissolved the next day, a member would have had nothing to lose by resigning, and a resignation, if effective, would have prevented the quorum that M’Calmont and others sought to prevent. Yet resignation was never even mentioned as a possibility, strongly suggesting that it simply was not an option. Resignation, like a temporary withdrawal from the Assembly, required the permission of the Assembly, permission which was unlikely to be forthcoming in those circumstances.

Like the Pennsylvania Constitution, the 1776 Virginia Constitution provided that each house of the legislature should issue writs for filling “intermediate vacancies,”¹⁵⁴ without specifying what could cause those vacancies. However, the document also explicitly provided for filling vacancies caused by resignation in the case of judges, court clerks, the secretary of state, and the attorney general,¹⁵⁵ again giving rise to an *expressio unius*-type argument.¹⁵⁶

The 1778 South Carolina Constitution allowed the legislative houses to issue writs for legislative vacancies “occasioned by death.”¹⁵⁷ Moreover, it directed the houses to set specific days for filling vacancies created if “any parish or district shall neglect to elect a

148. See *id.* at 104.

149. See *id.* at 104–09.

150. *Id.* at 109.

151. *Id.* Professor Ackerman concludes from all this that “[t]he threads of political legitimacy were visibly beginning to unravel.” 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 56 (1998). Although a full discussion of that point is beyond the scope of this Article, it should be apparent from what has been said thus far that forcing unwilling members to attend was an acceptable and accepted part of legislative procedure.

152. PA. CONST. of 1776, art. II, § 10, reprinted in 5 THORPE, *supra* note 133, at 3085.

153. For a discussion of the denominator problem in quorum rules, see generally John Bryan Williams, *How to Survive a Terrorist Attack: The Constitution’s Majority Quorum Requirement and the Continuity of Congress*, 48 WM. & MARY L. REV. 1025, 1037–67 (2006).

154. VA. CONST. of 1776, art. II, para. 27, reprinted in 7 THORPE, *supra* note 133, at 3816.

155. *Id.* art. II, paras. 35–36, reprinted in 7 THORPE, *supra* note 133, at 3817.

156. See *supra* note 6 and accompanying text.

157. S.C. CONST. of 1778, art. XVIII, reprinted in 6 THORPE, *supra* note 133, at 3253.

member or members on the day of election, or in case any person chosen a member of either house shall refuse to qualify and take his seat as such, or die, or depart the State.”¹⁵⁸ Additionally, holding certain state offices and service as a religious minister were made incompatible with service in the legislature.¹⁵⁹ None of these provisions, it should be noted, encompasses the resignation of a seat already held. Again, this omission is particularly telling in light of the explicit provision for the resignation of the governor.¹⁶⁰

The 1777 New York Constitution had no provision at all for filling legislative vacancies. It did, however, provide for filling vacancies occasioned by the resignation of the governor or lieutenant governor.¹⁶¹ Similarly, the 1777 Vermont Constitution allowed the filling of vacancies created by the resignation of state “officers”¹⁶² but said nothing about filling legislative vacancies.¹⁶³ The 1786 Vermont Constitution allowed for the replacement of “officers” whose positions were vacant because of “death or otherwise”¹⁶⁴ but still said nothing about filling legislative vacancies.

Most of the remaining early state constitutions neither said nor implied anything about resigning from the state legislature. Some had provisions for filling vacancies without any suggestion as to how those vacancies could come about;¹⁶⁵ others had both vacancy and incompatibility provisions but did not suggest what else might lead to such vacancies;¹⁶⁶ still others had vacancy provisions whose scope was unclear.¹⁶⁷

158. *Id.* art. XIX.

159. *Id.* arts. XX–XXI.

160. *Id.* art. VIII, *reprinted in* 6 THORPE, *supra* note 133, at 3249.

161. N.Y. CONST. of 1777, arts. XX–XXI, *reprinted in* 5 THORPE, *supra* note 133, at 2633.

162. VT. CONST. of 1777, ch. 2, § XVIII, *reprinted in* 6 THORPE, *supra* note 133, at 3745.

163. It is clear that “officers” does not apply to members of the General Assembly. *See id.* ch. 2, § XX (“Every officer of State, whether judicial or executive, shall be liable to be impeached by the General Assembly . . .”).

164. VT. CONST. of 1786, ch. 2, § 11, *reprinted in* 6 THORPE, *supra* note 133, at 3756.

165. *See, e.g.,* DEL. CONST. of 1776, art. 5, *reprinted in* 1 THORPE, *supra* note 133, at 563.

166. *See* GA. CONST. of 1777, arts. VII, XVII, *reprinted in* 2 THORPE, *supra* note 133, at 779, 780; N.C. CONST. of 1776, arts. X, XXV–XXXIII, *reprinted in* 5 THORPE, *supra* note 133, at 2790–91, 2792–93. New Jersey had only an incompatibility provision—and an odd one at that. It provided that anyone holding an executive or judicial office had to give it up upon election to the legislature, rather than vice versa. *See* N.J. CONST. of 1776, art. XX, *reprinted in* 6 THORPE, *supra* note 133, at 2598.

167. *See* MASS. CONST. of 1780 pt. 2, ch. 1, § 2, art. IV, *reprinted in* 3 THORPE, *supra* note 133, at 1897 (providing for the filling of “all vacancies in the senate, arising by death, removal out of the state, or otherwise”). The Massachusetts Constitution also has an incompatibility

One state, however, did allow its legislators to resign. The 1776 Maryland Constitution provided that

on refusal, death, disqualification, resignation, or removal out of this State of any Delegate, or on his becoming Governor, or member of the Council, a warrant of election shall issue by the Speaker, for the election of another in his place; of which ten days' notice, at least, (excluding the day of notice, and the day of election) shall be given.¹⁶⁸

Another clause allowed for the resignation of state senators.¹⁶⁹ It is important to note that the Maryland Constitution was explicit about the possibility of legislative resignation. Given that a right to resign from the legislature would have been novel at English law and does not seem to have existed in the colonies or the other states, it would have to be spelled out explicitly for it to exist at all.¹⁷⁰

C. *Practice in the Continental Congress under the Articles of Confederation*

The understanding that legislators had no individual right to resign seems to have carried over into the Continental Congress as well. The Articles of Confederation provided for a unicameral Congress to which each state could send between two and seven members.¹⁷¹ Each state, however, had only one vote,¹⁷² and delegates' salaries and expenses were to be paid by their state.¹⁷³ The delegates were "annually appointed, in such manner as the legislature of each state shall direct,"¹⁷⁴ and the state could, at any time, recall a delegate and send another in his stead.¹⁷⁵ Moreover, no one could serve as a

clause. *Id.* pt. 2, ch. 6, art. II. The New Hampshire Constitution, which was patterned on the Massachusetts, contained an identical vacancy provision. See N.H. CONST. of 1784, pt. 2, para. 14 (Senate), reprinted in 4 THORPE, *supra* note 133, at 2460.

168. MD. CONST. of 1776, art. VII, reprinted in 3 THORPE, *supra* note 133, at 1692.

169. *Id.* art. XIX, reprinted in 3 THORPE, *supra* note 133, at 1694.

170. See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992) (arguing that interpretation does and should favor continuity over change in legal regimes and that a clear legislative statement is needed to overcome the presumption in favor of continuity).

171. ARTICLES OF CONFEDERATION art. V, para. 2 (U.S. 1781).

172. *Id.* art. V, para. 4.

173. *Id.* art. V, para. 3.

174. *Id.* art. V, para. 1.

175. *Id.*

delegate for more than three years in any six-year period.¹⁷⁶ The Articles were, however, silent on the question of members' resignations.

Service in the Continental Congress does not seem to have been an altogether pleasant experience,¹⁷⁷ and the Congress frequently had trouble mustering the quorum of seven states required to transact business.¹⁷⁸ There did seem to be a general belief, however, that members had no right to absent themselves, even if the Congress had trouble enforcing that principle. In 1786, a congressional committee reported that, "a delegate having taken his seat in Congress, has no right to withdraw himself without permission obtained either from Congress or the state he represents."¹⁷⁹ That provision of the committee's report was not agreed to by the Congress, with five states voting for it, three voting against, and four states divided.¹⁸⁰ It should be noted, however, that of the thirty delegates voting, eighteen voted affirmatively and twelve negatively.¹⁸¹ It thus seems fair to say that a substantial majority of the delegates believed they had no right to withdraw.¹⁸²

176. *Id.* art. V, para. 2.

177. See JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* 220 (1979) (noting the "persistent turnover" in the Congress and attributing it to the fact that members "disliked the burdens Congress imposed and preferred to be at home").

178. *Id.* at 355 ("From the time of its retreat to Princeton until the very demise of the confederation, Congress struggled almost constantly to maintain the quorum of seven states required by the Articles.").

179. 30 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789*, at 408 (John C. Fitzpatrick ed., 1934).

180. *Id.* at 409.

181. *Id.*

182. It should also be noted that the Continental Congress was, in important ways, very different than the House of Commons, the colonial legislatures, or state legislatures. The "United States" created by the Articles of Confederation was more akin to "an alliance, a multi-lateral treaty of sovereign nation-states" than it was to a nation-state. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 25 (2005). Naturally, the Congress under such a scheme played a very different role than a national or subnational legislature would. *Id.* at 27. It has been noted both that the Continental Congress "acted less as a legislature than as an executive council," *id.* at 57, and that it had more in common with the General Assembly of the modern United Nations than with the American Congress under the Constitution, see CHAFETZ, *supra* note 22, at 165. It is possible that those delegates who voted against the provision to prohibit withdrawing simply did not see themselves as members of a legislature like the House of Commons or state or colonial assemblies and therefore did not understand their conduct to be governed by the rules that governed such bodies.

The behavior of elected delegates further supports this observation. As Professor Rakove has noted,

The republican values of the Revolution did not permit conscientious leaders casually to reject an appointment to office merely because it was inconvenient. Republicanism not only glorified the individual who risked private interest for the public weal, it also bestowed on the act of election the sovereign imprint of the popular will.¹⁸³

Indeed, quite a number of delegates served in the Continental Congress against their wishes.¹⁸⁴ Those who did wish to resign in the middle of their service had to “ask leave to Retire,” as North Carolina delegate John Williams did in 1779.¹⁸⁵

* * *

We have thus seen that preconstitutional American legislatures, with only one exception, followed the British rule that legislative service was a duty and that it therefore could not be resigned as a matter of right. The one exception we have seen—in the Maryland state constitution—was explicitly spelled out, probably precisely because it was understood to be exceptional. We have also seen that, as this practice made its way across the Atlantic, it altered subtly. Rather than seeking permission from Crown officials to resign, American colonial legislators sought permission from their houses. After the Revolution, it continued to be sought, not from state governors, but from legislative houses. And, as the next Part argues, this was the scheme envisioned under the Constitution, as well.

III. THE CONSTITUTION

The Constitution provides that, “[w]hen vacancies happen in the [House] Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.”¹⁸⁶ In contrast, “if Vacancies happen [in the Senate] by *Resignation, or otherwise*, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next

183. RAKOVE, *supra* note 177, at 232; *see also id.* at 233 (“Attendance at Congress was thus an obligation to be discharged, not an ambition to be fulfilled.”).

184. *See id.* at 232–36 (discussing a number of such delegates).

185. *Id.* at 234.

186. U.S. CONST. art. I, § 2, cl. 4.

Meeting of the Legislature, which shall then fill such Vacancies.”¹⁸⁷ The word “resignation” is used in describing the creation of vacancies in the presidency and vice presidency, as well.¹⁸⁸ The text of the House Vacancies Clause is silent about resignations; the question for the interpreter, then, is how pregnant a silence this is.

A. *Drafting and Ratification*

The Philadelphia Convention did, in fact, consider constitutional language that would have given representatives a right to resign. Virginia delegate Edmund Randolph, a member of the Committee of Detail, produced a “draft sketch” of a constitution,¹⁸⁹ which provided for filling “[v]acancies [in the lower house of the legislature caused] by death disability or resignation.”¹⁹⁰ For the Senate, the sketch simply provided a placeholder reading “Vacancies,”¹⁹¹ presumably because it was intended to be identical to the provision for the lower house. Randolph’s sketch, including this wording, was taken up by the Committee of Detail,¹⁹² but that was the last time in the Convention that this wording appeared. Several subsequent drafts in the Committee of Detail mentioned vacancies in the House of Representatives without suggesting how those vacancies could arise and said nothing at all about Senate vacancies.¹⁹³

The draft reported by the Committee of Detail to the full Convention provided that “[v]acancies in the House of Representatives shall be supplied by writs of election from the executive authority of the State, in the representation from which it shall happen,”¹⁹⁴ and that “[v]acancies [in the Senate] may be supplied by the Executive until the next meeting of the Legislature.”¹⁹⁵ There

187. *Id.* art. I, § 3, cl. 2 (emphasis added).

188. *See id.* art. II, § 1, cl. 6 (president); *id.* amend. XXV, § 1 (same); *id.* art. II, § 1, cl. 6 (vice president).

189. This sketch is reproduced in SUPPLEMENT TO MAX FARRAND’S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 183–93 (James H. Hutson ed., 1987).

190. *Id.* at 185.

191. *Id.* at 186.

192. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 137, 140, 142 (Max Farrand ed., rev. ed. 1966).

193. *See id.* at 154–55, 164–65.

194. *Id.* at 179.

195. *Id.*

was no mention of how those vacancies might arise. The Convention unanimously agreed to the provision for filling House vacancies.¹⁹⁶

The provision for filling Senate vacancies, however, was somewhat more contentious. James Wilson objected to the provision allowing governors to fill vacancies when the state legislature was not in session, but he was voted down.¹⁹⁷ Hugh Williamson proposed a provision that would allow state legislatures to create their own procedures to fill Senate vacancies during state legislative recesses, but he, too, was voted down.¹⁹⁸ There then followed a telling colloquy between James Madison and Gouverneur Morris:

Mr. Madison in order to prevent doubts whether resignations could be made by Senators, or whether they could refuse to accept, moved to strike out the words after “vacancies”. & insert the words “happening by refusals to accept, resignations or otherwise may be supplied by the Legislature of the State in the representation of which such vacancies shall happen, or by the Executive thereof until the next meeting of the Legislature”

Mr. Govr. Morris[:] this is absolutely necessary. otherwise, as members chosen into the Senate are disqualified from being appointed to any office by sect. 9. of this art: it will be in the power of a Legislature by appointing a man a Senator agst. his consent, to deprive the U.S. of his services.¹⁹⁹

Madison’s proposal then passed unanimously.²⁰⁰ Thus amended, the provision was accepted by the Convention,²⁰¹ and these provisions were not discussed again. At the end of the Convention, the Committee of Style cleaned up the wording, such that the House provision read, “When vacancies happen in the representation from any state, the Executive authority thereof shall issue writs of election to fill such vacancies.”²⁰² The Senate provision read, “[I]f vacancies happen by resignation, or otherwise, during the recess of the Legislature of any state, the Executive thereof may make temporary

196. *Id.* at 231.

197. *Id.*

198. *Id.* at 231–32.

199. *Id.* at 232 (footnotes omitted). This passage is Farrand’s reconstruction, combining elements of Madison’s notes and the Convention’s journal. I have omitted the brackets indicating which passages come from which sources.

200. *Id.*

201. *Id.* at 233.

202. *Id.* at 591.

appointments until the next meeting of the Legislature.”²⁰³ The House provision is unchanged in the Constitution except for capitalization.²⁰⁴ The words “which shall then fill such Vacancies” were added to the end of the Senate provision,²⁰⁵ which is otherwise unchanged except for capitalization.²⁰⁶

Note that both Madison and Morris understood it to be necessary (“absolutely necessary,” in Morris’s words) to explicitly provide for the resignation of senators; otherwise, they might be unable to quit their seats. Indeed, Morris even understood the incompatibility provision to run against *executive* office holding—that is, instead of appointment to executive office automatically vacating the Senate seat, holding a Senate seat would make someone ineligible for appointment to executive office. This seems especially troubling, both because of the length of a senator’s term and because of the method of his appointment—a state legislature could, without a person’s consent, prevent his appointment to, say, a cabinet position by appointing him to the Senate instead.

There was also concern about a related problem—members of Congress resigning to accept executive positions that had been created (or made more lucrative) during their time in Congress.²⁰⁷ George Mason argued that members should be ineligible to hold such positions until they had been out of Congress for at least a year; otherwise, “evasions may be made. The legislature may admit of resignations and thus make members eligible” for executive office.²⁰⁸ That is, without an appropriate “waiting period,” a self-dealing Congress could create offices (or increase their pay) with the understanding that those offices would be distributed to its members—precisely the sort of behavior against which the Emoluments Clause²⁰⁹ is meant to guard—but only if Congress *admits of resignations*. Of course, in a situation in which Congress is acting in such a self-dealing manner, it may well be inclined to allow

203. *Id.*

204. See U.S. CONST. art. I, § 2, cl. 4.

205. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 192, at 610 n.1.

206. See U.S. CONST. art. I, § 3, cl. 2.

207. This concern is responsible for the Emoluments Clause: “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time” *Id.* art. I, § 6, cl. 2.

208. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 192, at 394.

209. U.S. CONST. art I, § 6, cl. 2.

resignations, but the import of Mason's words is that this is a choice to be made by the house—in other situations it may choose *not* to admit of resignations. No member of the Convention challenged this assumption, expressed by Madison, Morris, and Mason, that, absent a clear statement to the contrary, resignation was up to the house, not the member. Moreover, despite the unanimous assent to Madison's "absolutely necessary"²¹⁰ (in Morris's words) proposal to insert a provision allowing senators to resign, no such provision was even proposed for representatives.

As scant as the materials from the Philadelphia Convention are regarding resignation from the House of Representatives, the post-Convention materials are even less helpful. The issue does not appear to have come up at all in the state ratifying conventions²¹¹ or in the debates in the press.²¹² Moreover, the canonical early treatises on the Constitution have little, if anything, to say about the House Vacancies Clause and nothing to say about the permissibility of resignation. In his famous *Commentaries*, Justice Story, after quoting the Vacancies Clause,²¹³ notes that "[t]he propriety of adopting this clause does not seem to have furnished any matter of discussion, either in or out of the convention," approves of the mode of filling vacancies, and moves on.²¹⁴ The Clause received even less attention from Justice Wilson,²¹⁵ St. George Tucker,²¹⁶ Thomas Cooley,²¹⁷ and Chancellor Kent.²¹⁸ Even

210. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 192, at 232.

211. See THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 2d ed. 1836) (5 vols.).

212. See THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981) (7 vols.); THE DEBATE ON THE CONSTITUTION (Bernard Bailyn ed., 1993) (2 vols.); THE FEDERALIST.

213. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 684, at 495 (Melville M. Bigelow ed., Boston, Little, Brown, 5th ed. 1891).

214. *Id.* § 685.

215. See JAMES WILSON, *Lectures on Law, Part Two: Of the Constitutions of the United States and of Pennsylvania—Of the Legislative Department*, in 1 THE WORKS OF JAMES WILSON 399 *passim* (Robert Green McCloskey ed., 1967) (discussing the structure of Congress without mentioning the provisions for filling vacancies).

216. See 2 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 177 n.59 (Philadelphia, Birch & Small 1803) (noting only that state executives issue writs of election to fill House vacancies).

217. See THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 47 (Boston, Little, Brown 1880) (noting only that House vacancies "are filled as may be provided by state laws").

218. See 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 207–27 (New York, Halsted 1826) (discussing the structure of Congress without mentioning the House Vacancies Clause at all).

Thomas Jefferson, the great parliamentarian of the early Republic,²¹⁹ had nothing to say about resignations.²²⁰

B. House versus Senate

Does it make any sense to think that the Constitution would employ different standards for resignation from the House and the Senate? Professor Currie dismisses such a possibility in less than a sentence tucked away in a footnote: “there appears to be no plausible reason for treating the two chambers differently in this regard, and thus every reason to conclude that the difference in phrasing was accidental.”²²¹ As we have seen,²²² however, Convention delegates made a deliberate decision—spearheaded by luminaries James Madison and Gouverneur Morris—to add a mention of resignation to the Senate Vacancies Clause. It would be a curious accident, indeed, for it never to have occurred to a single delegate that the same issue might arise with respect to the House Vacancies Clause. And yet, as we have seen, not a single Convention delegate did raise this issue, despite the unanimous assent to Madison’s insertion of resignation into the Senate Vacancies Clause. Moreover, *contra* Currie, there are at least three reasons why constitutional drafters and ratifiers might have wanted to treat the two chambers differently in this regard: length of term, method of election, and perceived function.

The first, and most straightforward, reason for distinguishing between the House and Senate on the question of resignation is the simple fact that Senate terms are three times as long as House terms.²²³ A six-year Senate term without a right to resign may have posed recruitment problems—after all, the new federal government was an experiment. Perhaps the new government would turn out to be a disaster, or perhaps service in the new Congress would turn out to be as unpleasant as service in the old (Continental) Congress had

219. See Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided, and Why INS v. Chadha Was Wrongly Reasoned*, 83 TEX. L. REV. 1265, 1268–69 (2005) (describing Jefferson’s prowess as a parliamentarian).

220. See Jefferson, *supra* note 8.

221. CURRIE, *supra* note 7, at 135 n.41.

222. See *supra* text accompanying note 199.

223. See U.S. CONST. art. I, § 3, cl. 1 (providing for a six-year Senate term); *id.* art. I, § 2, cl. 1 (providing for a two-year House term).

been.²²⁴ Indeed, during the ratification debates, even a federalist pamphleteer described congressional service as a burden: members of Congress “are taken from their professions and obliged to attend Congress, some of them at the distance of at least seven hundred miles.”²²⁵ Requiring potential senators to sign up for six-year terms—longer than the terms of any state legislature’s upper house²²⁶—without a right to leave if things turned bad could have prevented many of the nation’s brightest lights from taking a Senate seat. Moreover, whether or not it affected recruiting, it may simply have been thought inequitable to trap senators in a job they did not want for six years. Such concerns would have been substantially less with regards to a two-year House term.

Second, and relatedly, it was more plausible that someone would be unwillingly elected to the Senate than to the House. Recall that, until the ratification of the Seventeenth Amendment in 1913,²²⁷ senators were elected by state legislatures.²²⁸ To get the number of popular votes necessary for election to the House, candidates would almost certainly have to campaign or have their friends campaign on their behalf. At the very least, knowledge that a candidate did not want to serve would surely prevent the candidate’s election to the House. But a cabal in the state legislature determined to remove someone—say, the leader of the opposition party—from the state for six years could simply appoint that person to the Senate. This is not merely idle speculation—as we have seen, Gouverneur Morris was concerned precisely with a situation in which a state legislature appoints someone to a six-year Senate term without his consent.²²⁹

224. See *supra* text accompanying notes 177–78 (discussing the unpleasantness of service in the Continental Congress).

225. Noah Webster, *An Examination into the Leading Principles of the Federal Constitution, by a Citizen of America*, reprinted in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 212, at 129, 143.

226. See AMAR, *supra* note 182, at 75 (noting that no state upper house had a term of more than five years).

227. U.S. CONST. amend. XVII (providing for the direct election of senators). But cf. Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1354–55 (1996) (noting that, beginning in the 1890s, states had developed mechanisms to limit state legislatures’ discretion in choosing senators); William H. Riker, *The Senate and American Federalism*, 49 AM. POL. SCI. REV. 452, 463–67 (1955) (discussing the mechanisms used for expressing popular preferences for senators before the Seventeenth Amendment).

228. U.S. CONST. art. I, § 3, cl. 1.

229. See *supra* text accompanying note 199.

Moreover, at the Founding, members of the House of Representatives were the only federal officeholders directly elected by the people. As a federalist pamphleteer put it, the new Constitution “is more a government *of the people*, than the present [Continental] Congress ever was, because, the members of Congress have been hitherto chosen by the legislatures of the several states. The proposed representatives are to be chosen ‘BY THE PEOPLE.’”²³⁰ Or, as Madison put it,

Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.²³¹

With such exalted bosses, turning away from the job may have been perceived as especially unseemly. Or, to put it differently, republican obligation may be thought to bind more strongly when service is a direct, unmediated command of the sovereign.

Finally, the House and Senate may be thought to have different functions, which justify different treatment of resignations. Although it is certainly the case that the Senate, unlike the Continental Congress,²³² is a true legislative body, it is equally the case that its primary role in the Constitution’s bicameral scheme was the representation of the states’ interests. Both the equality of representation, without regard to population,²³³ and the mode of appointment of senators²³⁴ served to ensure that the Senate was, in Madison’s words, “a representation . . . of the States.”²³⁵ Hamilton

230. Plain Truth, *Rebuttal to “An Officer of the Late Continental Army,”* reprinted in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 212, at 105, 105.

231. THE FEDERALIST NO. 57, at 351 (James Madison) (Clinton Rossiter ed., 1961).

232. See AMAR, *supra* note 182, at 58 (comparing the Continental Congress—“a classic assemblage of ambassadors”—to the new Congress under the Constitution—“a genuine legislature”—and concluding that “the old Congress consisted of states’ men; the new Congress would consist of statesmen”).

233. See U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each state . . .”).

234. See *id.* (providing that Senators were to be chosen by state legislatures).

235. THE FEDERALIST NO. 58 (James Madison), *supra* note 231, at 357; see also THE FEDERALIST NO. 39 (James Madison), *supra* note 231, at 244 (“The Senate . . . will derive its powers from the States as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing [Continental] Congress.”); THE FEDERALIST NO. 62 (James Madison), *supra* note 231, at 377 (noting that the appointment of senators by state legislatures “is recommended by the double advantage of favoring a select

concurred, referring to the Senate as “a direct representation” of the states.²³⁶ Senators, as officeholders appointed by other officeholders for the purpose of representing the interests of a political entity, may have looked *just enough* like ambassadors²³⁷ to warrant treating them like ambassadors for the purposes of resignation. In contrast, a House of directly elected representatives, apportioned by population, was fully and unmistakably a legislative body.

This interpretation of the differing roles of the House and Senate is further bolstered by the practice of instruction in the early Republic. As Professor Riker puts it, “[e]lection by state legislatures implied accountability to them,”²³⁸ and the legislatures demanded this accountability via instructions on how to vote, a practice carried over from the Continental Congress.²³⁹ When a legislature had strong opinions about an issue pending before Congress, it would pass a resolution of the following form: “Be it resolved that our Senators in Congress are hereby instructed, and our Representatives are requested, to vote for”²⁴⁰ The difference in wording is a clear consequence of the differences in institutional design between the two houses of Congress. The House, like the state legislature, is elected directly by the people and ultimately answerable only to them.²⁴¹ The Senate, on the other hand, was elected by the state legislature and was therefore understood to be, in a sense, the agent of the state legislature. Instructing one’s agent is perfectly appropriate.

The problem, of course, was what to do if the senators disobeyed. Without the recall provision of the Articles of Confederation,²⁴² the

appointment, and of giving to the State governments such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems”); *id.* at 378 (“No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then, of a majority of the States.”).

236. THE FEDERALIST NO. 9 (Alexander Hamilton), *supra* note 231, at 76.

237. In this regard, it is also worth noting senators’ unique role in formulating foreign policy. See U.S. CONST. art. II, § 2, cl. 2 (requiring the Senate’s “advice and consent” for making treaties).

238. Riker, *supra* note 227, at 455.

239. *Id.* at 456 (“The doctrine of instructions followed naturally from political institutions prior to the Constitution.”).

240. *Id.* (internal quotation marks omitted).

241. Indeed, the Constitution requires that the electorate for seats in the House be perfectly coextensive with the electorate for seats in the lower house of the state legislature. U.S. CONST. art. I, § 2, cl. 1.

242. See *supra* text accompanying note 175.

only formal sanction the legislature had was a threat not to reelect²⁴³—but because senators' terms were much longer than those of state representatives, this was an uncertain threat: the legislative majority that the senators disobeyed might no longer be in power when the senators were up for reelection. Remarkably, however, senators' sense of honor²⁴⁴ seems to have served to enforce instructions in the early Republic. Beginning with John Quincy Adams in 1808,²⁴⁵ senators who were unwilling to follow instructions from their state legislatures were expected to resign. Although the practice was not universally followed, Professor Riker counts fifteen such "forced resignations" (and another six "almost forced" resignations) between 1808 and 1854.²⁴⁶

Instruction and forced resignation declined thereafter, as the states increasingly used mechanisms, both formal and informal, to gage popular sentiment in the choice of senators, thus decreasing senators' sense of accountability to state legislatures.²⁴⁷ The practice of instruction ended entirely with the adoption of the Seventeenth Amendment.²⁴⁸ The use of instructions thus highlights the quasi-ambassadorial role of senators in the early Republic, and the forcing of resignations when senators were unwilling to obey those instructions suggests another reason for treating the Senate differently from the House in the matter of resignations.

Of course, none of these factors is conclusive, but collectively they serve to undercut Professor Currie's suggestion that there is "no plausible reason"²⁴⁹ for treating the houses differently. Likewise, although the scant evidence from the drafting and ratification of the Constitution is not conclusive, it does support the thesis that members of the House of Representatives were not meant to have the right to resign. But the background norms from the British Parliament,

243. See Riker, *supra* note 227, at 457 (noting the North Carolina legislature's refusal to reelect Senator Samuel Johnston to the Second Congress because of his refusal to obey instructions).

244. See generally JOANNE B. FREEMAN, *AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC* (2001) (discussing the role of honor in politics in the early Republic).

245. See Riker, *supra* note 227, at 458 (explaining how the Massachusetts state legislature pressured Adams to resign after he voted for the Embargo Act).

246. *Id.* at 459 n.18.

247. See *id.* at 461–67 (tracing the decline of forced resignations and the reasons for that decline).

248. See *id.* at 456 ("State legislatures did indeed continue until 1913 to instruct their senators . . .").

249. CURRIE, *supra* note 7, at 135 n.41.

carried through the colonial and state legislatures and the Continental Congress, are clear that members have no right to resign, and nothing in the Founding-era history evinces a desire to do away with those norms. Indeed, insofar as the founding debates address the issue at all, they lend support to that idea.

IV. CONGRESSIONAL PRACTICE

Thus far, we have seen that no right of legislators to resign has ever existed at English law. We have seen that the English practice formed a sufficiently powerful background legal norm that the only American jurisdiction to reject it—Maryland, in its 1776 Constitution—did so explicitly. We have seen that the drafters of the Constitution operated with the assumption that, unless they made explicit provision for it, legislators would not have the right to resign. We have seen that they did make explicit provision for the resignation of senators; moreover, they had Randolph's draft before them, which would have explicitly provided for the resignation of representatives, but they chose not to use that wording. All of this combines to suggest that members of the House of Representatives have no constitutional right to resign. As a constitutional matter, members may request the House's permission to surrender their seats, but the House is not bound to give that permission.

Curiously, however, the House itself has seen the matter differently almost from the beginning.

A. *Early Congressional Practice*

1. *William Pinkney and John Francis Mercer.* In 1790, William Pinkney²⁵⁰ was elected to the House of Representatives from Maryland. However, he never took his seat, and, in September 1791, he sent a letter to the governor and council of Maryland seeking to resign his seat²⁵¹ for what his nephew and biographer called "reasons of a prudential and private nature."²⁵² The governor then issued a writ

250. Pinkney would go on to become "widely acknowledged to be the foremost lawyer of his day." Robert M. Ireland, *William Pinkney: A Revision and Re-emphasis*, 14 AM. J. LEGAL HIST. 235, 236 (1970). Pinkney represented the Bank of the United States in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Ireland, *supra*, at 241–45 (discussing Pinkney's role in the case).

251. See H.R. JOUR., 2d Cong., 1st Sess. 461 (Nov. 23, 1791) (reprinting the report of the Committee of Elections that laid out the facts).

252. WILLIAM PINKNEY, *THE LIFE OF WILLIAM PINKNEY* 21 (New York, D. Appleton & Co. 1853). Pinkney himself gave more details in a letter:

for a new election, which was won by John Francis Mercer.²⁵³ When Mercer sought to take his seat, the Committee of Elections was called upon to determine who, if anyone, was entitled to the Maryland seat.²⁵⁴

The committee recommended seating Mercer,²⁵⁵ but substantial debate ensued on the House floor. There were, essentially, three positions represented. One was that, in the words of William Loughton Smith of South Carolina, "the vacancy which had occurred on this occasion could not properly be called a resignation. Mr. PINKNEY had never taken his seat, nor the requisite oath."²⁵⁶ It is not altogether surprising that Smith should be a champion of this position—as we have seen, the South Carolinian colonial²⁵⁷ and state²⁵⁸ legislatures, like the British House of Commons,²⁵⁹ allowed for the filling of a vacancy created by refusal to take the oath of office, although none of them allowed for resignation. At least one commentator saw this position as dispositive.²⁶⁰

A second position held by some members was that, in the words of Hugh Williamson of North Carolina, "the Constitution

I have not been elected by the third district, whose representative it was intended I should be—I resided in a part of the state, whose interests, in some respects, are supposed to be at variance with theirs.—The legality of my election has been questioned.—I have not had time or opportunity to prepare my mind for the expected business in the continental legislature—and I have not health adequate to that degree of exertion which my situation would of necessity require.—On such terms I cannot serve.

Dependent altogether on my profession, my time is of the last importance to myself and family—nor will the loss of it, as I am circumstanced, be easily repaired. I am too young at the bar to intermit my professional duties for months together. In a word—it would be ruinous to me . . .

Letter from William Pinkney (Sept. 28, 1791), as reprinted in *Extract of a Letter from One of the Representatives of This State in Congress, to His Friend in This Town, Dated Hartford County, Sept. 28, 1791*, N.Y. J. & PATRIOTIC REG., Oct. 12, 1791, at 323 [hereinafter *Extract of a Letter*].

253. H.R. JOUR., 2d Cong., 1st Sess. 461 (Nov. 23, 1791).

254. *Id.* at 451 (Nov. 9, 1791) (referring the matter to the committee).

255. *Id.* at 461 (Nov. 23, 1791).

256. 3 ANNALS OF CONG. 206 (1791); see also *id.* at 206–07 (statement of Rep. Murray) (stating "several particulars to show that Mr. PINKNEY was not a member of the House agreeably to the Constitution"); *id.* at 207 (summarizing the statements of Elbridge Gerry, who expressed a similar sentiment).

257. See *supra* text accompanying notes 119–22.

258. See *supra* text accompanying note 158.

259. See *supra* text accompanying note 47.

260. See James Mercer Garnett, *John Francis Mercer, Governor of Maryland, 1801 to 1803*, 2 MD. HIST. MAG. 191, 207 (1907) ("[I]t took [the House] three days to decide how [Mercer] should take his seat, all due to the fact that William Pinkney had never taken his seat, nor the oath of office.").

contemplates that a member may resign.”²⁶¹ Joshua Seney, a fellow Marylander, rather ahistorically pronounced it a “new and very strange declaration to say that a member had not a right to resign.”²⁶² He also suggested that refusing to allow the resignation would cause an unacceptable “inconvenience . . . to the State of Maryland”²⁶³ and that it could potentially affect “the privilege of every free citizen” who might find himself elected against his will and forced to serve.²⁶⁴ Finally, he argued that “no difference did really exist” between the House and the Senate on the matter of resignation,²⁶⁵ although he made no attempt to explain the different wording of the Vacancies Clauses.

Finally, there were members who thought that there was no right of resignation. William Branch Giles of Virginia made two arguments in this vein. First, he suggested that allowing for this sort of resignation would give state governors an improper level of control over the composition of the House:

The constitution says, that when vacancies happen, the Executive may issue writs to fill up those vacancies; but it does not say that resignation causes a vacancy; and if the Executive in the present instance judges of the circumstances that cause a vacancy, he may do it in every instance; in which case, the members of the House may be reduced to hold their seats on a very precarious tenure indeed.²⁶⁶

That is, if state executives, rather than the House itself, had the power to accept resignations, then a governor could create a vacancy at any point simply by declaring that the person holding the seat had resigned. That begins to look uncomfortably like the power of recall in the Articles of Confederation.²⁶⁷ On this point, Giles was explicitly seconded by Elias Boudinot of New Jersey,²⁶⁸ and Theodore Sedgwick

261. 3 ANNALS OF CONG. 207 (1791) (statement of Rep. Williamson).

262. M. ST. CLAIR CLARKE & DAVID A. HALL, CASES OF CONTESTED ELECTIONS IN CONGRESS, FROM THE YEAR 1789 TO 1834, INCLUSIVE 46 (Washington, Gales & Seaton 1834).

263. *Id.*

264. *Id.*

265. 3 ANNALS OF CONG. 207 (1791) (statement of Rep. Seney).

266. CLARKE & HALL, *supra* note 262, at 45.

267. *See supra* text accompanying note 175 (noting the states’ power to recall congressional delegates under the Articles).

268. CLARKE & HALL, *supra* note 262, at 45.

of Massachusetts made a similar point.²⁶⁹ Giles' second point was a republican and historical one:

From recurring to the Constitution, he was of opinion that a resignation did not constitute a vacancy. The Constitution speaks only of vacancies in general, and does not contemplate one as resulting from a resignation. Adverting to the British House of Commons, he observed that in that body there could be no resignation. This is an established principle. The people having once chosen their representatives, their power ceases, and consequently the body to which the resignation ought to be made no longer exists. From the experience of the British Government in this respect, he argued against a deviation from this rule.²⁷⁰

That is, the American representative, like the British, answers only to the people. A resignation made to the governor violates this principle. Fisher Ames of Massachusetts suggested that allowing resignations without the House's consent would deprive the House of one of its traditional privileges: "the House, he observed, has a control over absent members; but if a member may resign when he pleases, he may do it out of the House, and withdraw himself from the power of the House whenever he thinks proper."²⁷¹

Ultimately, the House agreed to the resolution offered by the Committee of Elections that "John Francis Mercer is entitled to take a seat in this House as one of the Representatives for the State of Maryland, in the stead of William Pinkney."²⁷² Mercer was seated on February 6, 1792.²⁷³ What remains unclear is to what extent this decision should be read as recognizing a broad right of members to resign from the House and to what extent it should be read as limited to the case of a member-elect who had not yet taken the oath of office. Recall that, even in the British House of Commons, one in Pinkney's position could have triggered a vacancy by refusing to take the oaths.²⁷⁴ Moreover, at least some of the members in the debate seemed to consider it quite important that Pinkney had not yet taken the oath.²⁷⁵ It was thus still an open question whether the House

269. 3 ANNALS OF CONG. 207 (1791) (statement of Rep. Sedgwick).

270. *Id.* at 205-06 (statement of Rep. Giles).

271. CLARKE & HALL, *supra* note 262, at 46.

272. H.R. JOUR., 2d Cong., 1st Sess. 461 (Nov. 23, 1791).

273. *Id.* at 502 (Feb. 6, 1792).

274. *See supra* text accompanying note 47.

275. *See supra* text accompanying notes 256-60.

would allow a member who had already begun to serve to resign as a matter of right.

2. *Joshua Seney and William Hindman.* On December 6, 1792, the Speaker “laid before the House a letter from Joshua Seney, one of the Members for the State of Maryland, stating his acceptance of an appointment in the Judiciary Department of the said State, which disqualifies him from a seat in this House.”²⁷⁶ This was not the sort of appointment that triggered the Incompatibility Clause,²⁷⁷ which meant that Seney would actually have to resign from the House. Unfortunately, the *Annals of Congress* offer only a tantalizing hint of the debate. On December 7,

[t]he Letter from Mr. SENEY, containing his resignation was again read, and a motion made to refer the same to a committee; some debate ensued on this motion, in which the question was started how far it was in the power of a member of the House to vacate his seat; the solution of this, it was said, would involve a lengthy discussion of some constitutional questions; if it was the opinion of the House that the present case naturally included this discussion, the reference ought to be to a Committee of the Whole. Some gentlemen thought that the most simple process was to accept the resignation, and make entry accordingly in the Journal; a notification to be sent to the Executive of the State of Maryland. The motion for commitment of the Letter was negatived; a motion was then made that the SPEAKER of the House notify the Executive of the State of Maryland of a [vacancy in the] representation of that State, by the resignation of Mr. SENEY. This motion was negatived and the Letter laid on the table.²⁷⁸

From this truncated account,²⁷⁹ it appears that the House debated where and how to debate the constitutional issues surrounding Seney’s resignation, and, finding themselves unable to agree, simply did nothing. The *Journal of the House of Representatives* from December 7 confirms that no notification was sent to the Maryland governor.²⁸⁰ The governor, however, seems to have taken matters into

276. H.R. JOUR., 2d Cong., 2d Sess. 635 (Dec. 6, 1792).

277. See U.S. CONST. art. I, § 6, cl. 2 (providing that members of Congress cannot simultaneously hold “any Office under the United States” (emphasis added)).

278. 3 ANNALS OF CONG. 739–40 (1792).

279. This passage in the *Annals* is the only account of this debate that I have been able to find.

280. H.R. JOUR., 2d Cong., 2d Sess. 635 (Dec. 7, 1792).

his own hands: on January 23, 1793, the Speaker laid before the House a letter from the Maryland governor announcing that William Hindman had been elected to replace Seney; this letter, too, was ordered to lie on the table.²⁸¹ One week later, Hindman “appeared, produced his credentials, and took his seat in the House, the oath to support the Constitution of the United States being first administered to him by Mr. Speaker, according to law.”²⁸² There is no other recorded debate on the matter.²⁸³

3. *John Francis Mercer and Gabriel Duvall.* The debate over the first resignation from the Third Congress appears to have been even briefer. On May 31, 1794, the Speaker laid before the House a letter from the governor of Maryland announcing that John Francis Mercer—the same Mercer who had replaced William Pinkney after his resignation—had resigned and that Gabriel Duvall had been elected to replace him.²⁸⁴ The matter was referred to the Committee of Elections, which determined that Duvall should be seated.²⁸⁵ The House voted to do so.²⁸⁶ Again, the *Annals* provide a noticeably truncated account, including the tantalizing note that “[s]ome remarks fell from Mr. LEE respecting precedent. Mr. MERCER had formerly taken a seat in much the same way, in the room of Mr. PINKNEY.”²⁸⁷ It is also worth noting that, although some members wanted to seat Duvall without voting on the Committee of Elections’ report, James Madison insisted that the report be voted on.²⁸⁸ This may indicate that Madison continued to believe that a resignation was not effective until the House voted to accept it.

4. *Uriah Forrest and Benjamin Edwards.* After the Mercer resignation, the issue of resigning does not seem to have occasioned any floor debate at all. On January 1, 1795, the Speaker laid before the House a letter from Uriah Forrest, a representative from

281. *Id.* at 677 (Jan. 23, 1793).

282. *Id.* at 686 (Jan. 30, 1793).

283. After the truncated debate of December 7, the *Annals* also notes the letter from the Maryland governor, 3 ANNALS OF CONG. 835 (1793), and the seating of Hindman, *id.* at 853. One searches the intervening pages in vain, however, for any additional discussion.

284. H.R. JOUR., 3d Cong., 1st Sess. 192–93 (May 31, 1794).

285. H.R. JOUR., 3d Cong., 2d Sess. 225 (Nov. 11, 1794).

286. *Id.* at 226.

287. 4 ANNALS OF CONG. 874 (1794).

288. *Id.* (statement of Rep. Madison).

Maryland, stating that he had tendered his resignation to the governor and that Benjamin Edwards had been elected to replace him. This was accompanied by a letter from the clerk of the Maryland council, confirming both that Forrest had resigned and that Edwards had been elected in his stead.²⁸⁹ The letters were committed to the Committee of Elections.²⁹⁰ The next day, two more letters arrived—one from the governor, confirming that Edwards had been elected to replace Forrest, and the other a copy of Forrest's letter of resignation to the governor.²⁹¹ These, too, were referred to the committee.²⁹² That same day, January 2, the committee reported a resolution to seat Edwards.²⁹³ The preamble to the resolution certified that Forrest had indeed resigned and that Edwards had indeed been elected to replace him;²⁹⁴ nowhere did it suggest any doubt as to the propriety of resignation. The resolution was accepted by the House²⁹⁵ without any recorded debate,²⁹⁶ and Edwards was immediately sworn in.²⁹⁷

* * *

Why did the practice of the early House diverge so sharply from the practice and understanding up to that point? Although the available sources do not allow us to pin down a reason with precision, it should not pass without comment that the first four members to resign from the House were all Marylanders. As we have seen,²⁹⁸ the Maryland Constitution was the only state constitution to provide for legislative resignation. The Maryland political class may simply have had a different conception of the role of the legislator than did the politicians from other states—a less republican role that allowed for resignation whenever convenient.²⁹⁹ This would help to explain why,

289. H.R. JOUR., 3d Cong., 2d Sess. 279 (Jan. 1, 1795).

290. *Id.*

291. *Id.* (Jan. 2, 1795).

292. *Id.*

293. *Id.* at 280.

294. *Id.*

295. *Id.*

296. See 4 ANNALS OF CONG. 1041 (1795).

297. H.R. JOUR., 3d Cong., 2d Sess. 280 (Jan. 2, 1795).

298. See *supra* text accompanying notes 168–69.

299. Compare *Extract of a Letter, supra* note 252 (“I enclose my resignation, which you will be please [*sic*] to forward to the executive” (quoting William Pinkney)), with *Mr. Gore's Resignation*, HERALD OF FREEDOM & FED. ADVERTISER, Feb. 2, 1790, at 144 (describing Christopher Gore's “ask[ing] leave of the Hon. House” to give up his seat in the Massachusetts state legislature).

by the Third Congress, four Maryland representatives had resigned when not a single representative from any other state had, and the idea may have subsequently spread from those Maryland representatives to their colleagues.³⁰⁰

B. Contemporary Congressional Practice

1. *The Resignation of Benjamin Whittemore.* Thereafter, the matter seems to have been settled. Members were understood to have the right to resign at will, and throughout the nineteenth century, they did so.³⁰¹ Thus, in 1870, while facing an expulsion resolution for allegedly selling appointments to the Military and Naval Academies,

300. A series of letters between De Witt Clinton, writing on behalf of his uncle George Clinton, the governor of New York, and the New York congressional delegation illustrates the spreading of this norm. Silas Talbot, a member of the House of Representatives from New York, sought to resign his seat by letter to the governor. Clinton wrote, in a letter addressed to the entire New York delegation, that

an important question results for consideration, which is, the constitutional tribunal to decide whether a vacancy happens or not, the executive authority of the state or the house of representatives.

The governor is inclined to believe from the right of the house to judge of its own members and from inherent power in every legislative assembly to preserve and perpetuate its own existence, that the proper tribunal is the house of representatives

Letter from De Witt Clinton to New York Congressional Delegation (Dec. 19, 1794), in *AM. MINERVA*, Mar. 14, 1795, at 2. The delegation wrote back that, "whatever doubt might have been entertained on this point at the commencement of the government, the question has been since settled in practice [W]e beg leave to refer your Excellency to the printed Journals of the house of Representatives" Letter II (Jan. 1795), in *AM. MINERVA*, Mar. 14, 1795, at 2. Clinton shot back, "That precedents as to this point have existed prior to the case of Mr. Talbot is not believed and if they have occurred, they have escaped the Governor's notice, who is too much engaged in the important duties of his office to study attentively the journals of Congress" Letter III (Jan. 31, 1795), in *AM. MINERVA*, Mar. 14, 1795, at 2. Talbot served out the rest of his term (which, after all, ended on March 3, 1795).

Of course, the precedents to which the New York members were referring were the Maryland members' resignations. We thus see an aberrational practice of a single state being introduced by that state's representatives into Congress, leading representatives of other states quickly to assume that it was the norm—an assumption that surprised those familiar with legislative procedure in their home states.

301. As an example of how routinized resignation quickly became, Representative Thomas Oakley of New York submitted a letter of resignation on May 9, 1828. *H.R. JOUR.*, 20th Cong., 1st Sess. 719 (May 9, 1828). The next day, he was replaced on a committee. *Id.* at 720 (May 10, 1828). On December 1, 1828, Thomas Taber, II, was seated as his replacement. *H.R. JOUR.*, 20th Cong., 2d Sess. 7 (Dec. 1, 1828). There was no debate or vote on the matter whatsoever. *See* 4 *REG. DEB.* 2640 (May 9, 1828) (accepting Oakley's resignation without debate); 5 *id.* at 95 (Dec. 1, 1828) (beginning the new session without even noting the seating of Taber).

Benjamin Whittemore of South Carolina tendered his resignation.³⁰² Several members thought it was inappropriate to allow Whittemore to resign in order to escape the shame of expulsion, and two of them questioned the permissibility of resignation generally. Nathaniel Banks of Massachusetts, a former Speaker of the House, thought that

the House will be led into great difficulty if it accepts the doctrine that a member can resign his seat without the consent of the House. No principle of parliamentary law is better established, either in England or in this country, than that a member of a parliamentary body cannot resign without the consent of that body, either expressed or implied.³⁰³

The current Speaker, James Blaine, replied that “there never has been, as I am fortified by the opinion of the Journal clerk—there never has been a record of the acceptance of a resignation since the House was organized,”³⁰⁴ the implication being that no such acceptance was necessary. The Speaker continued, “The uniform practice of the House of Representatives from the foundation of the Government has been that when the resignation of a member has been handed in at the Clerk’s desk, the Chair must then cease to recognize him as a member.”³⁰⁵ However, “[i]f the House wishes to override that decision of the Chair, such positive action must emanate from the floor of the House.”³⁰⁶ That is, the House is not bound to accept a resignation, but a tendered resignation is automatically in effect until overtly overridden by the House.

Henry Dawes of Massachusetts thought that the Speaker had it backward: when the Speaker accepts a resignation as a matter of course, that should be understood as acceptance by unanimous consent.³⁰⁷ When an objection is raised, however, the issue should presumably be put to a vote, like any other. Dawes listed what he saw as the baleful implications of allowing “that a member can resign whether the House will or not”³⁰⁸:

302. H.R. JOUR., 41st Cong., 2d Sess. 372–73 (Feb. 24, 1870).

303. CONG. GLOBE, 41st Cong., 2d Sess. 1545–46 (1870) (statement of Rep. Banks).

304. *Id.* at 1546 (statement of Rep. Blaine).

305. *Id.*

306. *Id.*

307. *Id.* (statement of Rep. Dawes).

308. *Id.*

If a member, when the Constitution clothes us with the power to punish a member for any offense here, can prevent us from discharging that duty by resigning, whether we will or not, the power of the House to control its own constitution is at an end. If a member can resign, whether the House will or not, we can be left at any moment without a quorum by a certain number of members sending papers of resignation to the desk.³⁰⁹

John Bingham then raised a point of order, insisting that “the capacity of a member to resign has been disposed of,” and the chair ruled Dawes’s remarks out of order,³¹⁰ putting an end to the debate over resignation.

2. *The Statute of 1872.* Today, it seems unlikely that even two members could be found to join Banks and Dawes in their stance against a right to resign. Federal law in effect since 1872 allows states to set the time for filling House vacancies, “whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected.”³¹¹ This explicit recognition of the possibility of resignation is accompanied by a House practice that “[a] Member properly submits his resignation to an official designated by State law and simply informs the House of his doing so, the latter communication being satisfactory evidence of the resignation.”³¹² In short, the House has essentially concluded that resignation is a matter of individual right—that is, a matter for the member alone to decide.³¹³

V. HOW SHOULD THE HOUSE TREAT RESIGNATIONS TODAY?

What relevance does this history have for contemporary congressional procedure? Could House practice be changed to make resignation no longer a matter of right? If so, how—and, perhaps more importantly, why? Alternatively, if it could not or should not be changed, does the understanding that it was not originally meant to be a constitutional right hold any valuable lessons for us today?

309. *Id.*

310. *Id.* (statements of Reps. Bingham and Blaine).

311. 2 U.S.C. § 8 (2006) (originally passed as part of the Apportionment Act of 1872, ch. 11, § 4, 17 Stat. 28, 29 (1872)).

312. BROWN & JOHNSON, *supra* note 8, at 484.

313. Today, House resignations are commonplace. *See supra* note 1 (listing some recent resignations). These resignations draw no debate whatsoever in the House.

My contention in this Part is that there are good reasons for ceasing to treat resignation as a matter of right. That is to say, there are good reasons, sounding in republican political theory, for requiring members to obtain the consent of the House before quitting their seats. Before going into these reasons, however, it will be helpful to state a few preliminaries.

First, it should be noted that the 1872 statute³¹⁴ poses no bar to a decision by the House that resignation is not a matter of right. The Rules of Proceedings Clause leaves the determination of each chamber's procedural rules up to that chamber.³¹⁵ Any attempt to create House rules by legislation eliminates cameral autonomy by introducing bicameralism and presentment into the mix and therefore cannot bind the House.³¹⁶ Thus, although there is no constitutional problem with the House's following the 1872 statute,³¹⁷ it could also alter the statutory scheme by a simple resolution.

It should also be noted, however, that the reasons for treating the House and Senate differently with regard to resignations have become less salient over time, especially with the passage of the Seventeenth Amendment. As we have seen, there were at least three reasons at the Founding for distinguishing between the chambers in this regard.³¹⁸ First, Senate terms are significantly longer than House terms. The strength of this reason remains undiminished. The second reason, however, was the possibility that someone would be elected to the Senate against his will by an unfriendly state legislature. The Seventeenth Amendment's move to popular elections for senators³¹⁹ has made this at least as unlikely for the Senate as it is for the House. And third, the two chambers were understood at the Founding to have somewhat different functions, with the Senate looking more like a collection of ambassadors and the House a more popular

314. 2 U.S.C. § 8; *see also supra* note 311 and accompanying text.

315. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . .").

316. For more detailed elaborations of this principle, see CHAFETZ, *supra* note 22, at 57–59; Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process Is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. 960, 1007–10 (2007); Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1779–87 (2002).

317. Indeed, because the 1872 statute was passed by the House, its scheme remains in effect until the House overrides it.

318. *See supra* Part III.B.

319. U.S. CONST. amend. XVII, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . .").

representative body. The move to popular election of senators has dimmed this distinction, but it has not eliminated it. For one thing, the states' equality of representation in the Senate³²⁰ means that the Senate's constituencies remain the states, rather than the American people as a whole. In contrast, representation in the House must be generally proportional,³²¹ which makes the individual citizen the fundamental unit of representation for the House. For another, representatives remain significantly more numerous than senators, making them, in some sense, more popular representatives.

It should also be made explicit what it would mean if the House were to stop allowing resignations as a matter of right. It would mean simply that, for a resignation to become effective, the House would have to vote to accept it. In many cases—for instance, when a member seeks to resign because of health issues—the resignation would most likely be accepted as a matter of course.

But there are also countervailing considerations. Refusing to allow resignations might punish constituents by forcing on them an unwilling representative. It might also be seen as unfair to the representatives themselves. And it should certainly give us pause that it would fly in the face of over two centuries of American practice.

With these background issues in mind, it is worth considering what reasons we might have today for wanting to restrict resignation from the House. Below, I present two paradigm cases that, I submit, demonstrate why such a restriction would be valuable. Although there may be other reasons for restricting resignation (for example, preventing representatives from gaming the seniority system³²² or, possibly, preventing them from manipulating quorum counts³²³), these

320. *Id.* art. I, § 3, cl. 1 (providing that each state shall have two senators); *see also id.* art. V (providing that no constitutional amendment may deprive a state of its equal representation in the Senate without that state's consent).

321. *See Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (holding that the constitutional requirement that representatives be chosen by the people “means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's”).

322. Members could time their resignations so that their successors could be elected both to serve out the remainder of their term and for the next term. These successors would only get a few days of legislative experience in the expiring term, but they would have seniority over all of the other entering freshmen in the next Congress. Denying such late-in-the-game retirement requests could prevent this outcome, as could dating members' seniority from the beginning of their first *full* term.

323. The Constitution states that “a Majority of each [house] shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties, as each

two paradigm cases seem to present not only the most compelling reasons for rethinking the House's position on the resignation of members but also the clearest view of the ways in which republican values are best served by such a rethinking.

A. *Punishing Members*

The first paradigm case is that of the member who resigns to escape some sort of punishment by the House. Expulsion from—and perhaps even censure by—the House carries a stigma greater than that of resignation, even resignation under fire. After all, the tendency of members to resign when facing likely expulsion³²⁴ can

House may provide." U.S. CONST. art. I, § 5, cl. 1. The House currently interprets a quorum as "a majority of those Members sworn and living, whose membership has not been terminated by resignation or by House action." BROWN & JOHNSON, *supra* note 8, at 733. Under this interpretation, resignation lowers the numerator and the denominator and therefore has no effect. But recent scholarship suggests that this interpretation may be wrong and that the proper denominator for quorum purposes is the number of seats. See Williams, *supra* note 153, at 1051–64 (discussing the evolution of House quorum rules).

If this latter interpretation is correct, then a mass resignation could deprive the House of a quorum. Consider the following scenario: It is November 3, 2010. The Democrats hold a two-vote majority in the House, but there are three vacancies, so the Democrats alone are insufficient for a quorum. Democrats also control the Senate and the presidency. As a result of the previous day's elections, however, the Republicans will assume control of the House on January 3, 2011. The House Democratic leadership has resolved to use its few remaining days in power to pass a number of controversial bills. However, in a striking display of party discipline, every House Republican resigns on November 4, thus preventing the assembly of a quorum before the beginning of the next Congress in January. This may seem farfetched, but we have seen that it was a worry for Representative Dawes in 1870, see *supra* text accompanying note 309, and mass flight—although not mass resignation—was a worry for the Texas legislature in 2003, see Edward Walsh, *Texas Legislature Adjourns a Special Session: Governor to Call Members Back a 3rd Time to Force Vote on GOP Redistricting Plan*, WASH. POST, Aug. 27, 2003, at A4 (describing how Texas senate Democrats blocked what they alleged was a gerrymandering attempt by state Republicans by leaving the state and consequently depriving the state senate of the required two thirds quorum).

Note that this worry is unique to the House for two reasons. Under the Seventeenth Amendment, governors may, in accordance with state law, appoint replacements to fill Senate vacancies until a new election can be held. Thus, a few governors could stymie any attempt to deprive the Senate of a quorum by mass resignation. In the House, where vacancies can only be filled by election, see U.S. CONST. art. I, § 2, cl. 4, it would take significantly longer to fill those seats. Second, Senate terms are staggered. Although it might be plausible that House members would resign *en masse* in the scenario sketched above—after all, they have all either just been reelected, in which case they will get their seats back in two months, or they are only giving up two months of time in Congress anyway—it is highly unlikely that senators, many of whom would have two or four years remaining in their terms, would be willing to go along.

324. Of the eight House resignations noted in the Introduction, see *supra* note 1, four of them—Representatives Cunningham, DeLay, Foley, and Ney—resulted from behavior which

only be explained by a sense that resignation is preferable to expulsion. Indeed, this phenomenon is not limited to members of Congress: “You can’t fire me; I quit!” has become a popular literary trope.³²⁵

Although resignation from the House does not prevent a censure³²⁶ (and perhaps should not prevent imprisonment by the House³²⁷), it clearly does prevent expulsion. Insofar as a member has an interest in telling the House, “You can’t fire me; I quit!”, the House may have an equally strong interest in replying, “You can’t quit; we’ve just fired you!” Indeed, we saw exactly this debate play out over the resignation of Benjamin Whittemore in 1870.³²⁸ Whittemore sought to resign precisely to avoid being disciplined over his ethical lapses, and Henry Dawes, arguing against the right of resignation, told the House that “[i]f a member, when the Constitution clothes us with the power to punish a member for any offense here, can prevent us from discharging that duty by resigning, whether we will or not, the power of the House to control its own constitution is at an end.”³²⁹ We have seen a similar impulse in the House of Commons, where the Chiltern Hundreds was denied in the mid-nineteenth century to keep members from taking advantage of “corrupt compromises.”³³⁰ And at least one English-descended

allegedly breached ethical rules to an extent that expulsion would not have been at all improbable. A fifth, Representative Janklow, resigned after being convicted of manslaughter.

325. See, e.g., Jan Battles, *Bell X1 and Label ‘Agree to Part’*, SUNDAY TIMES (London), Feb. 11, 2007, at 3 (“You can’t fire us—we quit. Bell X1, Ireland’s biggest band after U2, have left their record company days after rumours that they were being dumped.”); Adam Bernstein, *Oscar Brown Jr. Dies; Songwriter, Performer Had Eclectic Career*, WASH. POST, May 31, 2005, at B7 (“We were really young zealots, and that went on till I got booted out of the Communist party when I was 30 years old, about 1956. It was one of those situations where “you can’t fire me, I quit!” We fell out on the race question. I was just too black to be red!” (quoting the deceased, Oscar Brown, Jr.)); Harvey Blume, *Alan Dershowitz*, BOSTON GLOBE, Mar. 5, 2006, at E3 (summarizing Professor Alan Dershowitz’s criticism of Lawrence Summers’s resignation as president of Harvard as “You can’t fire me; I quit!”).

326. See CHAFETZ, *supra* note 22, at 93 (noting that the House’s power of punishing members “extends to punishing former Members for disorderly acts done while Members”).

327. Each house of Congress has the power to punish contempts against it and breaches of its privileges, whether those offenses are committed by Members or non-Members. Available punishments against members include expulsion, imprisonment, fine, censure or reprimand, and loss of seniority. See *id.* at 207–35; see also Josh Chafetz, *Politician, Police Thyself*, N.Y. TIMES, Dec. 2, 2006, at A15 (arguing for an increased use of the congressional houses’ own disciplinary powers against their members, including the power of arrest).

328. See *supra* Part IV.B.1.

329. CONG. GLOBE, 41st Cong., 2d Sess. 1546 (1870) (statement of Rep. Dawes).

330. See *supra* text accompanying notes 108–10.

legislature refused a resignation in the twentieth century for the same reason—in 1951, the lower house of the Indian parliament refused to allow a resignation when it sought, instead, to expel a member.³³¹

In short, although the disciplinary power of the House would continue to extend to actions taken by former members while in office, there are more—and more serious—punishment options available while the member remains in the House. Moreover, given the large number of demands on the House's time, it may be more likely to take an “out of sight, out of mind” approach: why bother disciplining a member who is already gone? But for many ethical breaches, the expressive value of an explicit condemnation may be great—that is, the claim that a member is resigning “to spend more time with family” ought not to be allowed to pass without institutional comment. If inaction was not an option—that is, if the House *had* to vote on whether or not to accept the member's resignation—it might decide that it would be just as easy (and considerably more cathartic) to vote instead to expel the member. The expressive value of such expulsions might do a lot to increase the public perception of congressional ethical standards.³³² Moreover, the fact that members of the House are closer to the people and elected on terms of numerical equality by the people³³³ may make ethical breaches by House members especially suitable for public expressions of outrage, whereas ethical breaches by senators, who are more removed from the people and whose unit of representation remains the state, may be less so.

Note that this rationale for refusing to allow resignations as a matter of right does not presuppose that members would actually be kept in the House against their will. Rather, it changes the terms of the bargaining over *how* they leave the House. Under existing rules, individual members hold all of the power, as the decision is entirely theirs. But the change proposed here would shift power to the

331. See Madhu Dandavate, *The Future of Parliamentary Democracy*, in FIFTY YEARS OF INDIAN PARLIAMENT 366, 371 (G.C. Malhotra ed., 2002) (discussing the H.C. Mudgal expulsion and noting that his attempt to resign was considered an “attempt to circumvent the effects of the motion expelling him from the House . . . which constituted a contempt of the House and aggravated his offence”); see also ARUN PROKAS CHATTERJEE, PARLIAMENTARY PRIVILEGES IN INDIA 59 (1971) (discussing the same case).

332. See Josh Chafetz, Comment, *Cleaning House: Congressional Commissioners for Standards*, 117 YALE L.J. 165, 166–67 (2007) (arguing that the public perception of congressional action against corruption is in the public interest).

333. See *supra* text accompanying note 321.

House—it would allow the House as an institution to dictate the terms on which members leave. More importantly, however, it would constrain the House in dictating those terms: if members had to vote either way in a floor vote, then they would have to explain why they voted to let an obviously corrupt member walk away without any sort of condemnation. In short, members under an ethical cloud who wanted to leave the House would still leave the House—but their colleagues would be forced to contemplate whether the voters consider the ethical transgressions of that member sufficiently egregious to demand institutional comment by the House. The expressive costs of allowing a member to resign for spurious reasons would thereby be internalized by the House rather than externalized onto the polity.

B. Duty of Service

The second paradigm case is that of members who seek to resign because they are simply sick of the job or wish to take jobs that are more lucrative or personally convenient. The recent resignation of former Speaker Dennis Hastert³³⁴ fits this bill—shortly before he announced that he was stepping down, an anonymous Republican aide told CNN that “I think he is just done with being a member of Congress.”³³⁵ That is to say, the job ceased to interest him, so, rather than serve out the remainder of his two year commitment, he quit.³³⁶

Whether or not we allow our representatives to resign says something about how we see our government and how our representatives see their relationship with us. “The truth is,” Plato argued, “that the city where those who rule are least eager to do so will be the best governed and the least plagued by dissension.”³³⁷ The ruling class must therefore be trained to approach ruling as “an

334. See Parsons & Pearson, *supra* note 1.

335. *Congressional Sources: Hastert Won't Serve Out His Term*, CNN.COM, Oct. 18, 2007, <http://www.cnn.com/2007/POLITICS/10/18/hastert/index.html>.

336. In the same vein, one could also consider Representative Albert Wynn of Maryland, who, as the *New York Times* noted, “lost to a primary challenger in February and promptly announced that he would retire in June—the sooner to become a high-paid partner in a Washington lobbying powerhouse. Mr. Wynn leaves constituents the choice of having no representation for six months or holding a costly special election.” Editorial, *Trolling for the Spoils of Office*, N.Y. TIMES, Apr. 6, 2008, § 4 (Week in Review), at 13.

337. PLATO, THE REPUBLIC ¶ 520d, at 214 (Richard W. Sterling & William C. Scott trans., 1985).

imposed necessity.”³³⁸ Although he had the convenient aid of a noble lie to reinforce the expectation of public spiritedness in the ruling class,³³⁹ Plato understood that education would do the heavy lifting.³⁴⁰ The polis would be best governed when those governing it had successfully been inculcated with certain norms of public service and devotion to the commonweal.

This republican ethos can be traced from the ancient world to Florentine political theory and from Florentine theory to Atlantic practice.³⁴¹ It is evident in the House of Commons’ insistence that Sir Thomas Estcourt could not refuse his seat, because refusal “were to prefer the will, or contentment, of a private man, before the desire and satisfaction of the whole country.”³⁴² It is apparent, too, in the behavior of delegates to the Continental Congress, who endured unpleasant service, far from home, in an ineffectual body out of a sense of republican obligation.³⁴³ And we have seen it in Nathaniel Banks’s and Henry Dawes’s insistence that Benjamin Whittemore ought to be forced to stand before the House and be punished for selling the public trust, rather than be allowed to resign.³⁴⁴

Arrayed against that, we have seen a conception of legislative service as private right. On this view, legislative service is a job like any other, to be sought after when desired and put aside when something more attractive comes along—that is, when one is “just done with” it. This is a view that sees it as preposterous and unjust that members who wish to resign may be kept in their seats against their will. This is the view that has won the day in America, starting with the Second Congress.

Under this latter view, members who were not allowed to leave the House at the time of their choosing would be subject to something like specific performance of an employment contract—which, as

338. *Id.* ¶ 520e, at 214.

339. *See id.* ¶¶ 414b-15c, at 112–13 (advocating a “noble lie” inculcating the message that the ruling class was born to rule the polis, thereby reinforcing an ethic of service among the members of that class).

340. *See, e.g., id.* ¶¶ 376c-412b, at 72–110 (discussing the education of the guardians).

341. *See* POCKOCK, *supra* note 11 *passim* (tracing this flow of ideas); *see also* MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 166 (1996) (“Jacksonians and Whigs retained the . . . assumption that the public good is more than the sum of individual preferences or interests.”); *supra* text accompanying notes 9–13.

342. GLANVILLE, *supra* note 14, at 101. *See generally supra* text accompanying notes 14–20.

343. *See supra* text accompanying notes 183–85.

344. *See supra* text accompanying notes 302–10.

every first-year contracts student knows,³⁴⁵ is widely frowned upon.³⁴⁶ Under the republican view, however, legislative service is not appropriately analogized to an employment contract. The republican would, instead, note that those who voluntarily enlist in the military can be forced to remain in the service against their will,³⁴⁷ and, indeed, that they can have their tours of duty involuntarily extended.³⁴⁸ The military enlistment contract specifically provides that military enlistment “is more than an employment agreement.”³⁴⁹ The republican would suggest that legislative service is best thought of in the same vein.

I submit that it is the republican view which better expresses our sense of what the most representative branch of government ought to be.³⁵⁰ House service is unlikely to be foisted on those who have not sought it. Is it really so onerous to tell people who ran for House seats that they must remain there for two years? Members are well compensated, in both financial and psychic wages, and for that

345. See, e.g., EDWARD J. MURPHY ET AL., *STUDIES IN CONTRACT LAW* 987–99 (6th ed. 2003).

346. See, e.g., *Arthur v. Oakes*, 63 F. 310, 317–18 (7th Cir. 1894); *Lumley v. Wagner*, (1852) 42 Eng. Rep. 687, 693 (Ch.); RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (1981); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 779, 783 (1983). But see Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. (forthcoming 2008) (manuscript at 1–3), available at <http://ssrn.com/abstract=1114799> (arguing both that, rightly read, the Thirteenth Amendment does not enact a blanket prohibition on specific performance of employment contracts and that, in many cases, specific performance is preferable to damages as a remedy for breach of an employment contract).

347. See 10 U.S.C. § 886 (2006) (providing punishments for going absent without leave).

348. See *id.* § 506 (providing for involuntary extension of enlistments during wartime); *id.* § 12305 (“[T]he President may suspend any provision of law relating to promotion, retirement, or separation applicable to any member of the armed forces who the President determines is essential to the national security of the United States.”); see also *Doe v. Rumsfeld*, 435 F.3d 980, 984–88 (9th Cir. 2006) (upholding military “stop-loss” orders, issued pursuant to 10 U.S.C. § 12305, against constitutional and statutory challenges).

349. *Armed Forces of the United States, Enlistment/Reenlistment Document*, DD Form 4/1, at 2 (Oct. 2007), available at <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd0004.pdf>.

350. See BENJAMIN FRANKLIN, *The Autobiography of Benjamin Franklin*, in *AUTOBIOGRAPHY AND OTHER WRITINGS* 3, 112–13 (Kenneth Silverman ed., 1986) (taking as a personal maxim, “I shall never *ask*, never *refuse*, nor ever *resign* an Office”); ANDREW SABL, *RULING PASSIONS: POLITICAL OFFICES AND DEMOCRATIC ETHICS* 145 (2002) (arguing that the unique virtue of the legislator is “love of fame”—that is, “the determination to engage in ‘extensive and arduous enterprises for the public good’”). Indeed, the House seems to recognize a republican ethic of service insofar as it requires that the resignation of its own officers (for example, its clerk, sergeant, etc.) is “subject to acceptance by the House.” CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 109-157, R. II(1), at 358 (2007).

compensation we have a right to demand that they commit to putting the public interest above their own for a short period.³⁵¹ Allowing resignation as a matter of right sends the message that House service is a job like any other, a job that one takes because it suits one's ends, rather than a trust one holds to serve a greater good. In contrast, when leaving the House is a matter of legislative grace, rather than individual right, the message is sent that devotion to the public weal is held above desire for personal gain. This, I suggest, is closer to our aspirational conception of the House of Representatives. Indeed, even though the Chiltern Hundreds is never denied today, it is still a salutary fiction—or, put differently, a noble lie. Members of the House of Commons do not resign; they simply accept a Crown office incompatible with parliamentary service. They give up one form of service in pursuit of another, rather than in pursuit of private ends. This is a fiction, but an instructive one. We may well wish to tell a similar story about ourselves in the United States: members may leave only after the House, in which all Americans are represented on terms of numerical equality, has determined that their departures are not inimical to the commonweal.³⁵²

But what of the represented? Would it not be in the public interest to allow representatives to resign, rather than forcing them to

351. In support of his argument that the Thirteenth Amendment did not enact a blanket prohibition on specific enforcement of employment contracts, Professor Oman has found that “involuntary servitude” had four basic components in pre-Thirteenth Amendment caselaw: (1) the contract was not freely entered into; (2) there was not *bona fide* consideration; (3) the contract extended over a long period of time; and (4) the contract involved “complete domination by the master of the servant, including the right to use violence to coerce the servant.” Oman, *supra* note 346 (manuscript at 24–25). It should be apparent that a member's being obligated to remain in the House would not implicate any of these components.

352. It may fairly be asked why this principle of republican legitimacy should not be applied to the Senate as well. The simplest answer—that the Constitution provides for resignations from the Senate but not from the House—begs the question: we are trying to come up with a reason *why* the House should be held to the republican principles, and if the similarly situated Senate is not held to them, that might be evidence that the Constitution embodies no such principles. At the Founding, the answer was that the Senate was *not* similarly situated. See *supra* Part III.B. The Seventeenth Amendment made the houses more similarly situated, but term length may be decisive here. Republican principles may suffice to oblige a member to serve out a two-year term, but not a six-year term. There are good reasons, both *ex post* and *ex ante*, for this distinction. *Ex post*, it may simply seem unfair to oblige senators to serve for over half a decade against their will. After all, their circumstances may change dramatically and unforeseeably in such a period, whereas circumstances are less likely to change significantly in a two-year period. *Ex ante*, good candidates may simply be unwilling to sign up for a six-year commitment without a guaranteed possibility of exit, whereas a two-year commitment is much less of a risk. Therefore, allowing a right of resignation from the Senate as a general rule may increase the caliber of the candidate pool enough to make it a good republican move.

continue to represent their constituents unwillingly? Here, we have to consider the alternative. Filling a vacancy takes a considerable amount of time;³⁵³ moreover, many states do not fill House vacancies created after a certain point in the congressional term,³⁵⁴ preferring to leave them vacant until the next general election rather than spend the money to hold a special election. It seems likely that even an unwilling representative is preferable to no representative at all.

Moreover, it is, again, worth noting that this republican value does not depend on any member's actually being refused permission to leave the House, and, again, it seems unlikely that members would frequently be refused permission to leave. Rather, the value is in the mere fact that members have to *ask*. In so doing, they reinforce both the reality and the public perception of what a representative's relationship to the polity ought to be.

CONCLUSION

It is a long road from Sir Thomas Estcourt³⁵⁵ to Dennis Hastert.³⁵⁶ This Article has sought to map that road, from the monarchical and then republican conception that members of the House of Commons had no individual right to leave their seats to the more liberal conception that members of today's House of Representatives can leave their seats at will. This Article has used this historical map to argue that the Constitution gives the House of Representatives the power to refuse to allow members to resign, although the House has never exercised that power. And finally, this Article has argued that Congress has good reasons for ceasing to allow resignations as a matter of right.

Doing so would constitute a turn toward a more republican public political theory. It is certainly not the contention of this Article

353. See, e.g., CAL. GOV'T CODE § 1773 (West 2008) (providing that the governor has up to fourteen days after the occurrence of a House vacancy to issue a writ of election); CAL. ELEC. CODE § 10703(a) (West 2007) (providing that a special election is to occur between 112 and 126 days after the governor issues the writ); MASS. GEN. LAWS. ch. 54, § 140(a) (2008) (providing that special elections to fill vacant House seats must occur between 145 and 160 days after the creation of the vacancy).

354. See, e.g., MASS. GEN. LAWS. ch. 54, § 140(b) (2008) (providing that no special election will be called to fill a vacancy occurring after February 1 of an even-numbered year); OKLA. STAT. tit. 26, § 12-101(b) (2008) (providing that no special election will be called to fill a vacancy occurring after March 1 of an even-numbered year).

355. See *supra* text accompanying notes 14–20.

356. See *supra* text accompanying notes 334–35.

that the American Constitution is a purely republican document, any more than it is a purely liberal one. Rather, my contention here is that, in the context of the relationship between legislators, legislative houses, and the public, the pendulum has swung too far in the direction of the individual members, and that a republican corrective is in order. Republican theory understands the holding of public office to be a trust, and those to whom the commonweal has been entrusted ought not to be able lightly to put it down to pursue their own private ends. Legislators who want to leave office before the end of their term ought to be forced to tell their colleagues—and the nation—why they wish to surrender the public trust and seek their colleagues' permission to do so. This rule, the rule envisioned by the authors and ratifiers of the Constitution, would make it clear that legislators exercise power in the people's interest, not their own.

Certainly, a return to an older understanding of how members leave the House of Representatives is not the only component of such a republican corrective, and, indeed, I have elsewhere suggested other components.³⁵⁷ This Article has focused on resignations from the House, however, because this topic affords a clear view into how a once-republican relationship became less so. The history allows us to see what values were served by this conception of legislative service, and it provides food for thought as to how those values can—and whether they should—be assimilated to an, admittedly, more liberal and less republican era. I have suggested in this Article ways in which they both can and should.

We may no longer want actually to force members to serve against their will by telling them, as the Commons told Estcourt, that they have no right to prefer their own “will, or contentment” over “the desire and satisfaction of the whole country.”³⁵⁸ But neither, I submit, do we want our representatives simply to walk away, cheerfully announcing that they do, in fact, prefer their own contentment over the desire and satisfaction of the whole country—

357. See Josh Chafetz, *Curing Congress's Ills: Criminal Law as the Wrong Paradigm for Congressional Ethics*, 117 YALE L.J. POCKET PART 238, 239–42 (2008), <http://thepocketpart.org/2008/04/17/chafetz.html> (arguing that congressional ethics enforcement should be understood as aimed primarily at the maintenance of public trust, not at the detection and punishment of wrongdoing); Chafetz, *supra* note 332, at 171–72 (recommending the creation of Congressional Commissioners for Standards); Chafetz, *supra* note 327 (arguing that the houses of Congress should use their inherent power to arrest and imprison their own members when those members break house rules).

358. GLANVILLE, *supra* note 14, at 101.

or, put differently, that they are “just done” with serving the common interest, their two-year commitment notwithstanding.³⁵⁹ This Article’s suggestions may, I hope, move us closer to an option more palatable than either of those.

359. See *Congressional Sources*, *supra* note 335.